91-1354

Supreme Court, U.S.
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No.———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States conveyed lands beneath a navigable river to the Cherokee Nation by treaty and fee patent, and later declared that the lands "shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit" of the Cherokee Nation. The United States subsequently damaged the riverbed by constructing a navigation project and then authorized the Cherokee Nation to prosecute a moral claim for those damages "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

The questions presented are:

1. Whether the exercise of a navigational servitude under the Interstate Commerce Clause overrides the duty of the United States under the Indian Commerce and Treaty Clauses to deal fairly and honorably with an Indian tribe regarding riverbed lands conveyed by the United States to the tribe in fee simple and held by the United States in trust for the tribe's benefit?

2. Whether the federal government's failure to establish navigational rights expressly in treaties and fee patent, and the active recognition by the United States of the Cherokee Nation's governmental power over navigation makes the subsequent assertion of the navigational servitude against the Cherokee Nation's riverbed title a violation of the fair and honorable dealings clause of the Indian Claims Commission Act?

3. Whether the power of Congress to pay debts of the United States under Article I, section 8, cl. 1 of the Constitution includes claims based on fair and honorable dealings that are not recognized by any existing rule of law or equity and against which legal or equitable defenses may not be interposed?

PARTIES

The petitioner is the Cherokee Nation of Oklahoma. The respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

The Cherokee Nation of Oklahoma petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, p. 1a), is reported at 937 F.2d 1539 and 948 F.2d 635. The opinion of the district court (App., p. 18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1991. A petition for rehearing was denied on October 25, 1991. On January 3, 1992, Circuit Justice White extended the time for filing a petition for certiorari to and including February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

U.S. Const. art. I, § 8, cl. 1 (The Congress shall have power . . . to pay the debts . . . of the United States).

U.S. Const. art. I, § 8, cl. 3 (The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes).

U.S. Const. art. II, § 2 (The President shall . . . have power, by and with the advice and consent of the Senate, to make Treaties).

Act of April 26, 1906, ch. 1876, 34 Stat. 137, § 27, App. p. 86a.

Pub. L. 97-385, 96 Stat. 1944 (1982), App. p. 29a.

Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946), App. p. 31a.

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Treaty of July 2, 1791, 7 Stat. 39, App. p. 53a.

Treaty of March 22, 1816, 7 Stat. 139, App. p. 59a.

Treaty of July 8, 1817, 7 Stat. 156, App. p. 61a.

Treaty of May 6, 1828, 7 Stat. 311, App. p. 67a.

Treaty of December 29, 1835, 7 Stat. 478, App. p. 74a.

STATEMENT OF THE CASE

A. Procedural History

Public Law 97-385, 96 Stat. 1944 (1982), App. p. 29a, authorized claims against the United States by the Cherokee, Chickasaw and Choctaw Indian Nations "relating to and arising from" the government's construction and operation of the McClellan-Kerr Arkansas River Navigation Project. Public Law 97-385 expressly incorporated the causes of action established under section 2 of the Indian Claims Commission Act, 60 Stat. 1049, including "claims in law or equity" and "claims based upon fair and honorable dealings that are not recognized by any exising rule of law or equity." App. p. 31a.

The Cherokee Nation filed this action in the Eastern District of Oklahoma alleging two causes of action. The first was that the navigation project took tribal land without compensation in violation of the Fifth Amendment. The second stated that the construction of the project violated the duty of the United States to deal fairly and honorably with the tribe. The case was bifurcated and the Fifth Amendment claim was heard first.

In the Fifth Amendment claim, the Cherokee Nation argued that compensation was required because the McClellan-Kerr project used and occupied that portion of the Arkansas River bed which the United States had earlier conveyed to the Cherokee Nation by treaty and patent and to which this Court had quieted title in *Chocktaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The District Court and the Court of Appeals agreed and

ordered the government to pay just compensation to the tribe. This Court reversed and held that the federal government's navigational servitude was a bar to compensation. *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). The fair and honorable dealings claim was not before the Court and was not addressed. *Id.* at 709 n.1.

On remand the parties stipulated to submission of the remaining fair and honorable dealings claim on cross-motions for summary judgment. On December 22, 1987, the district court granted the United States' motion for summary judgment. App. p. 24a. The court of appeals affirmed. *Cherokee Nation of Oklahoma v. United States*, 937 F.2d 1539 (10th Cir. 1991). App. p. 1a. The court stated:

> We agree with the district judge who concluded that the Cherokee Nation "has failed to show, and in fact cannot show, that the United States has assumed a special obligation to compensate plaintiff for the exercise of its navigational servitude."

App. p. 9a. The court of appeals also ruled that the equitable basis for recovery established by the Court of Claims in *Burkhardt v. United States*, 84 F. Supp. 553 (Ct. Cl. 1949), was inapposite because there Congress had expressly authorized compensation for exercise of the navigational servitude after the Supreme Court had rejected the legal claims in that case. App. p. 15a.

In a petition for rehearing and suggestion for rehearing *en banc* filed on September 23, 1991, the Cherokee Nation argued that the court of appeals had erred in finding no special relationship between the United States and the Cherokee Nation, and had misconstrued the decision in *Burkhardt v. United States*. The court appeals agreed that it had misconstrued *Burkhardt* and corrected its opinion, but nevertheless denied the petition for rehearing. *Cherokee Nation v. United States*, 948 F.2d 635 (10th Cir. 1991). App. p. 18a.

B. Historical Background

The historical background of this case is summarized in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) and *United States v. Cherokee Nation*, 480 U.S. 700 (1987), and will be repeated only briefly here.

In exchange for the Cherokee Nation's cession of an extensive territory in the east in the 19th century, the United States conveyed to the Cherokee Nation by treaty and patent (App. p. 78a) lands encompassing a portion of the Arkansas River as "a permanent home, . . . which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever" and "which would never be embraced within the boundaries of any State or Territory." 397 U.S. at 624, 626. Thereafter, the United States decided to require the allotment of the Cherokee Nation's territory to tribal members and sell the remaining lands to settlers in order to facilitate the creation of the State of Oklahoma.

Following Oklahoma's admission to the Union, state and federal officials mistakenly assumed that title to the Arkansas River bed had passed to the State of Oklahoma under the equal footing doctrine. Acting under that assumption, the United States constructed the McClellan-Kerr Navigation Project without compensating the Cherokee Nation for the use and occupancy of the Nation's riverbed lands. In 1970, just before project construction was completed, this Court held that the conveyance to the Cherokee Nation included fee simple title to a portion of the bed of the Arkansas River occupied by the project. 397 U.S. at 637. That decision confirmed that the riverbed was subject to a statutory trust which expressly provided that unallotted Cherokee lands "shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians." Section 27, Act of April 26, 1906, 34 Stat. 137, 148. App. p. 86a.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision conflicts with principles of constitutional law established in decisions of this Court, and with decisions of the Court of Claims. In addition, the court of appeals has decided important questions of law regarding the nature and extent of the federal trust responsibility and the navigational servitude in the context of Congress' authority to pay debts of the United States arising out of morality and honor which have not been, but should be, settled by this Court.

I. THE COURT OF APPEALS CONCLUSION THAT THERE WAS NOT A SPECIAL RELATIONSHIP WITH A NEXUS TO THE NAVIGATIONAL SERVITUDE BETWEEN THE CHEROKEE NATION AND THE UNITED STATES ON WHICH TO BASE A FAIR AND HONORABLE DEALINGS CLAIM CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS, AND WITH TREATIES OF THE UNITED STATES.

In *United States v. Cherokee Nation*, 480 U.S. 700 (1987), this Court recognized that there was a fiduciary relationship between the United States and the Cherokee Nation over the trust status of the riverbed lands.

> It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity. When it holds lands in trust on behalf of the tribes, the United States may not "give the tribal lands to others, or . . . appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them."

480 U.S. at 707 (citations omitted). This Court went on to rule that the trust relationship was not sufficient to overcome the navigational servitude in the Cherokee Nation's Fifth Amendment claim for compensation. *Id.* at 707-08. That is not the end of the matter, however, as regards resolution of the fair and honorable dealings claim here, which this Court expressly noted was not ad-

dressed in its decision. *Id.* at 702 n. 1. This claim is about the morality of reserving and exercising the navigational servitude against the Cherokee Nation, not the power of the United States to do so.

A. The Special Relationship Between The United States And The Cherokee Nation Has A Nexus To The Navigational Servitude.

The special relationship between the United States and the Cherokee Nation prevents the navigational servitude from being a complete bar to recovery under the fair and honorable dealings clause. The treaties with the Cherokee Nation, the patent for lands in the Indian Territory, the representations on behalf of the United States by federal officials to the Cherokee Nation, the active support by federal officials of the Cherokee Nation's exercise of governmental and proprietary power over commerce and navigation in the Cherokee territory, and Congress' placing the riverbed lands in trust, referred to in *Chocktaw Nation v. Oklahoma*, 397 U.S. 620 (1970), establish the moral foundation for this claim. The court of appeals' conclusion that

> the Cherokee Nation has failed to demonstrate that in some way the government undertook a special relationship such that it would forego or restrict its historic right under the Commerce Clause so that the government was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise

(App. p. 22a) is erroneous: it refuses to acknowledge the integral relationship between the United States and the Cherokee Nation regarding navigation and commerce, and so misunderstands the nature of the fair and honorable dealings cause of action as to make it meaningless.

Appendix G hereto sets forth a chronology of the relations between the United States and the Cherokee Nation that documents a mutual understanding of the Cherokee Nation's sovereign and proprietary authority over navigation and commerce in the Arkansas River. From their earliest relations, the United States treated

with the Cherokee Nation for the public right of passage in Cherokee territory. The United States did not assert any dominant servitude or right of navigation in the Cherokee Nation's eastern territory. Instead, the United States established a course of dealing through which it secured explicit agreements for the right to navigate the streams in the Cherokee territory. For example, the Treaty of July 2, 1791, 7 Stat. 39, App. p. 53a, provides:

> Article V
>
> It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a *free and unmolested use* of a road from Washington district to Mero district, and *of the navigation of the Tennessee River.*

(Emphasis added.) In an addendum to the Treaty of January 7, 1806, 7 Stat. 101, made September 11, 1807, 7 Stat. 103, App. p. 56a, the Cherokee Nation "ceded to the United States all the right, title and interest which the said Cherokee nation ever had to a tract of country . . . includ[ing] all waters of the Elk River." The Treaty of March 22, 1816, 7 Stat. 139, App. p. 59a, provides:

> Article 2
>
> It is *expressly agreed* on the part of the Cherokee Nation that . . . the citizens of the United States shall *freely navigate and use as a highway, all the rivers and waters within the Cherokee nation.* The Cherokee nation further agree to *establish and keep up*, on the roads to be opened under the sanction of this article, such *ferries* and public houses as may be necessary for the accommodation of the citizens of the United States.

(Emphasis added.)

Later, during the removal of some of the Cherokees west of the Mississippi to lands in what is today Arkansas in the vicinity of the White and Arkansas Rivers, rights of navigation in that territory again were expressly provided for:

> Art. 9 It is also provided by the contracting parties, that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein.

Treaty of July 8, 1817, 7 Stat. 156. App. p. 63a.

The United States understood that the treaty provisions by which the Cherokee Nation granted the right of navigation to non-Indians within their territory retained authority in the Cherokee Nation to regulate commerce involving river navigation. For example, on March 8, 1813, the government agent with superintendence over the Cherokee Agency witnessed the grant of authority by the Cherokee Nation for the construction of a turnpike in Cherokee territory, including "one ferry on Tennessee River, and such other ferry or ferries as are necessary on said road . . ." A copy of the authorization was certified on March 1, 1819. II Kappler, Indian Affairs, Laws and Treaties 180-181. App. p. 65a. In 1817, the United States negotiated an agreement to use the Cherokee waterways for postal service. App. p. 36a. In 1826, the Cherokee Nation rejected a presidential request for authority to construct a navigation canal because doing so would require "the right of soil and jurisdiction over the ground where the canal would pass, and which the Cherokee Nation can never surrender." App. p. 38a.

Up to that point in their history, the Cherokee Nation negotiated treaties with the United States in expectation of trade and intercourse with the non-Indian community. Accordingly, the United States recognized the need to secure the right of navigation because it furnished one of the only means of efficient transportation in frontier territory. The treaties providing for the final removal of the Cherokee Nation to the Indian Territory had a different premise, however. They contemplated that the Indians would be isolated and the lands set aside would be guaranteed to them forever. Treaty of May 6, 1828, 7 Stat. 377, Article 2. Article 8 of that treaty proclaimed that by its terms the

> *Cherokee Nation,* West of the Mississippi . . . *freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity,* under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country.

(Emphasis added) App. p. 68a.

Significantly, the 1828 treaty is not entirely silent on the matter of reserving rights to the United States. The United States made one reservation in Article 9, a site for a military base (Fort Gibson) for which

> the Cherokees agree[d] that the United States shall have and possess the right of establishing *a road* through their country for the purpose of having a free and unmolested way *to and from said Fort.*

(Emphasis added) App. p. 69a.

The Treaty of December 29, 1835, 7 Stat. 478, App. p. 74a, provided for the removal of the remaining Cherokees east of the Mississippi River to the Indian Territory. Once again the keynote to the treaty was the separation of the Indians from the non-Indians. The "Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States" could be eliminated. *Id.* Preamble. The 1835 treaty reserved the right of the United States to provide for common, intertribal use of a salt plain (Article 2) and the

> right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary . . . .

Id. Article 3. Otherwise the treaty provided that the United States would convey by patent and guarantee the security of the lands ceded to the Cherokees so that

> in no future time without their consent, [would those lands] be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons or property within their own country . . . .

Id. Article 5.

Thus, in a course of dealings spanning half a century and culminating in the 1828 and 1835 treaties, when the United States had an interest in the right of navigation, it expressly secured it by treaty with the Cherokee Nation.

Following removal to the Indian Territory, the Cherokee Nation exclusively regulated use of the Arkansas River and other rivers within its territory into the 20th Century. App. pp. 39a-52a, 83a-85a. The United States did not object to the Cherokee Nation's doing so; rather it actively assisted the Cherokee Nation in the exercise of that governmental authority. App. pp. 43a-49a, 84a. The Cherokee Nation's Treasurer considered all applications and would issue them for fixed terms upon payment of a ferry tax. App. p. 85a. In addition, the United States military declared that it had no jurisdiction to regulate river commerce in Cherokee territory; that was subject to Cherokee authority. The military, however, did control importation of liquor to Cherokee territory at points of entry on overland routes. App. p. 41a. And at a time when Congress was acting to expand admiralty jurisdiction over western, navigable inland waterways (*e.g.*, 5 Stat. 746 (1845)), federal officials referred claims for sinking vessels to the courts of the Cherokee Nation. App. p. 44a.

The silence of the 1828 and 1835 treaties on the issue of navigation was neither inadvertent nor the result of a belief that navigation rights were of no importance. In their annual reports the federal agents in the Indian Territory made annual reports to the Commissioner of In-

dian Affairs recognizing the value of the river to the Cherokee Nation's economy.

> Stone coal is . . . found in many parts of the nation. In fact, the country is inferior to none west of the Mississippi. *With the Arkansas river passing through a large portion of it, upon whose waters the surplus productions of the nation can be transported to market, steamboats can ascend, bringing goods, groceries, and such articles as are required for the use and consumption of the people.*

(Emphasis added) No. 43, "Report of William Armstrong, Agent for the Choctaws, and Acting Superintendent, Western Territory (November 25, 1839)" contained in *Report of the Commissioner of Indian Affairs, War Department, Office of Indian Affairs (1839)* 467-468.

Later, the Agent recommended that the government relinquish its military reservation of Fort Gibson, pursuant to Article 3 of the 1835 treaty, *supra*, because of its value to the Cherokee Nation as a site for river-borne commerce.

> I would respectfully call your attention to a matter which, though disapproved by your predecessor, from its propriety and importance I think it is my duty to again refer to: I mean *the abandonment of Fort Gibson as a military post.* I do not wish, in making this suggestion, to intimate that the officers in charge of it are in any way remiss in their duty, or that the troops are an injury in themselves, but as *occupying a locality that would be of great value to the citizens of the* [Cherokee] *nation, being at the head of steamboat navigation, near the junction of the Arkansas and Grand Rivers, and in possession of the only eligible point on the river from which commercial advantages can be derived,* while their continuance now is unnecessary.

(Emphasis added) No. 42, "Report of George Butler, Cherokee Agent (September 27, 1854)" contained in *Annual Report of the Commissioner of Indian Affairs (1854)* 114-115. By 1857, the recommendation had been

heeded; the government abandoned Fort Gibson and it reverted to the Cherokee Nation. No. 86, "Report of George Butler, Cherokee Agent (September 8, 1857)" contained in *Report of the Commissioner of Indian Affairs (1857)* 211-212.

The court of appeals stated (App. p. 13a) that:

> If particular activities or interests of the Cherokee Nation had been specifically protected by statutes and representations of the government . . . and then the Navigation System had disrupted the Cherokee Nation's protected activities, a violation of a special relationship might be shown.

As has been shown, the interests of the Cherokee Nation in regulating commerce and navigation had been recognized, accepted and protected by the United States.

Accordingly, the conveyance without reservation of a servitude, and federal acceptance of Cherokee governmental authority and proprietary control of the Arkansas River evidence the special relationship's nexus with the navigational servitude.

B. The Conveyance Of The Riverbed By The United States To The Cherokee Nation Necessarily Implicates The Navigational Servitude In The Special Relationship Between The United States And The Cherokee Nation.

The unique decision in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) that the riverbed lands had been conveyed to the Cherokee Nation prior to Oklahoma statehood is in contrast to all other cases involving title to lands under navigable water.[1] To reach the conclusion it

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[1] Indeed, in only a single case—*Choctaw Nation v. Oklahoma*—have we concluded that Congress intended to grant sovereign lands to a private party. The holding in Choctaw Nation, moreover, rested on the unusual history behind the Indian treaties at issue in that case and indispensable to the holding was a promise to the Indian Tribe that no part of the reservation would become part of a State. Choctaw Nation

did in *Choctaw Nation*, the Court reviewed the principle expressed in *Shively v. Bowlby*, 152 U.S. 1 (1894) which held that "Congress has the power to make grants of lands below high water mark of navigable waters . . . to carry out . . . public purposes appropriate to the objects for which the United States hold the Territory . . . ." *Id.* at 48 (emphasis added). The conveyance to the Cherokee Nation occurred under this justification. The purpose was not to promote navigation and commerce among the states, or to ensure that the lands and governmental powers of the Cherokee Nation would be on an equal footing with other States. It was to respond to persistent demands by the eastern States that Indian title be extinguished so that expansion of the non-Indian economy could proceed, and to fulfill a solemn promise to the Cherokee Nation to isolate it from commerce with other states, secure its sovereignty and peaceful possession of new lands in the west, and avoid the depredations suffered by the Cherokee Nation through contact with non-Indian settlements in the east. *Choctaw Nation v. Oklahoma*, 397 U.S. at 622-27; *see also* Douglas, J., concurring. *Id.* at 636-43.

The court of appeals also concluded that while a fair and honorable dealings claim was compensable where the United States had transferred tribal property to others, such a claim would not lie where the government converted tribal property to its own use under the navigational servitude. 937 F.2d at 1546. If the conversion of tribal property by the federal trustee is actionable at all, however, it should be irrelevant whether the conversion was for the trustee's own benefit or for a third party. In either situation the damage to the beneficiary is the same.[2] The position of the Cherokee Nation in this

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was thus literally a "singular exception," in which the result depended "on very peculiar circumstances."

Utah Division of State Lands v. United States, 482 U.S. 193, 198 (1987) (citations omitted).

[2] This case is distinguishable from *Nevada v. United States*, 463 U.S. 110 (1983) in which Congress had created competing obliga-

regard is similar to that in *United States v. Creek Nation*, 295 U.S. 103 (1935), in which the government's power over tribal property was held not to be absolute but subject to limitations inhering in its guardianship of the tribe. Compensation was awarded in *United States v. Creek Nation* under a special jurisdictional act which authorized "legal and equitable claims" but not claims based on fair and honorable dealings. 295 U.S. at 105. In contrast, the fair and honorable dealings cause of action here is based upon moral grounds against which legal defenses such as the navigational servitude are unavailing. *See Creek Nation v. United States*, 168 Ct. Cl. 483, 496 (1964). The obligations defined by this Court in *United States v. Creek Nation* should apply here, especially in view of the explicit fiduciary obligations established for the riverbed lands under section 27 of the Act of April 26, 1906, ch. 1876, 34 Stat. 137. App. p. 86a.

II. ASSERTION OF THE NAVIGATIONAL SERVITUDE AGAINST THE CHEROKEE NATION'S TITLE IS INCONSISTENT WITH THE STANDARDS OF FAIR AND HONORABLE DEALINGS TO WHICH THE UNITED STATES IS HELD IN THIS CASE.

In spite of the seemingly universal applicability of the navigational servitude, this Court has rejected a *per se* rule that all naturally navigable waters are subject to the no compensation rule that ordinarily governs exercise of the "Commerce Clause authority to promote navigation," *Kaiser Aetna v. United States*, 444 U.S. at 172, and which was applied by this Court to the Cherokee Nation's Fifth

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tions for the Secretary of the Interior. Here there is no such conflict between congressionally established vested interests. Instead, the federal fiduciary has converted the riverbed trust lands to its own interest. In response, Congress has declared its intention to pay any debts which resulted from damages caused by that conversion, even though those debts may not be recognized by any existing rule of law or equity. Public Law 97-385. App. p. 29a.

Amendment claim in *United States v. Cherokee Nation.*[3] *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979); *see also Boone v. United States*, 944 U.S. 1489, 1501 (9th Cir. 1991). This fair and honorable dealings claim warrants an exception to the no compensation rule of the navigational servitude. When the United States vested riverbed ownership in the Cherokee Nation, both parties gave every indication of their mutual understanding that the conveyance embraced complete, unencumbered property rights, including "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). *See also, Boone v. United States* 944 F.2d 1489, 1499 (9th Cir. 1991). The context of that conveyance and the relationship between the parties created an expectation that is backed by a duty of fairness and honor which requires compensation for any damages caused by the reservation of the navigational servitude and its eventual exercise with the construction of the McClellan-Kerr Navigation Project.

A. The General Rule That Exercise Of The Navigational Servitude Is Not Compensable Was Not Fully Expressed By This Court Until Long After Treaty And Statutory Commitments And Other Representations To The Contrary Had Been Made By The United States To The Cherokee Nation.

While the federal authority over navigation had been read into the Commerce Clause as early as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the first *compensation* case involving the navigational servitude did not reach this Court until 1893. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). In the early decisions on compensation claims the navigation servitude

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[3] None of the cases on which the Court based its decision in the Fifth Amendment claim, however, involved title to submerged lands that had been conveyed to private parties by the United States under any of the *Shively v. Bowlby* principles or in the context of a treaty and fiduciary relationship.

was held to bar recovery for damage to private rights in some cases but not others. *Compare Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) and *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211 (1900) with *Gibson v. United States*, 166 U.S. 269 (1897) and *Union Bridge Co. v. United States*, 204 U.S. 364 (1907). *See also* Robert E. Clark, Water and Water Rights, § 101.3(B) (1978) (contrasting *Monongahela* and *Gibson*, *supra*). Although the navigational servitude by now has been firmly established as a general exception to the Takings Clause of the Fifth Amendment (*e.g.*, *United States v. Rands*, 389 U.S. 121, 123 (1967)), at this late date, more than one hundred and fifty years after the Cherokee Nation had received both proprietary and governmental power over the Arkansas River,

> "there is little explanation of its origin or basis to be found in either the cases or the literature" . . . . Though its constitutional foundation is the commerce clause, it appears to be based in part on considerations of the common law doctrines of *jus publicum* and public trust.

Boone v. United States, 944 F.2d at 1494, quoting Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 Nat. Resources J. 1, 21 (1963).

Significantly in view of the history of this claim, one commentator suggests that what gives the navigational servitude its extraordinary exemption from the Takings Clause is not any judgment that the Commerce Clause inherently possesses superior authority over the Fifth Amendment; rather

> [t]he best explanation for the special no compensation rule of the navigation servitude is that the long history of the recognition and protection of public rights of navigation, even against the sovereign, has put all riparians on notice that private claims inconsistent with the exercise of the servitude will not be recognized.

Tarlock, *Law of Water Rights and Resources*, § 9.04[2][a] (1990). *See also United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) ("There . . . has been ample notice over the years that such property is subject to a dominant public interest [in the navigational servitude]").

The notice theory rests on *Union Bridge Co. v. United States*, 204 U.S. 364 (1907) which held that private parties who occupied lands in navigable waters "did so with the knowledge of the paramount authority of Congress to regulate commerce among the states . . . ." 204 U.S. at 400. It makes no difference if the occupancy was authorized by a State because States take title to the lands under navigable water subject to the federal power over commerce and navigation and they have no power to qualify that authority. *Id. Union Bridge*, however, relied on precedent that involved express notice (*West Chicago Street R. Co. v. Chicago*, 201 U.S. 506 (1906)), and itself actually involved express notice not to interfere with navigation. The State charter under which the bridge in *Union Bridge* was constructed had acknowledged the superior authority of navigational rights and "expressly warned the company that its bridge must not obstruct navigation,—that is, in legal effect, navigation as it then was, or might be at any subsequent time." *Id.* at 401.

With notice as the linchpin for the extraordinary authority of the navigational servitude, the court of appeals decision cannot stand against the fair and honorable dealings claim of the Cherokee Nation. The concept of a navigational servitude on the Arkansas River bed lands simply was unimagined by either the Cherokee Nation or the United States. Notice of the servitude was not evident in the jurisprudence or otherwise at the time of the dealings between the Cherokee Nation and the United States. The United States did not claim, and the Cherokee Nation was never given to understand, that the explicit provisions of its earlier treaties on matters of sovereignty and navigation were qualified or rendered

meaningless by the equal footing doctrine or constitutional principles relating to interstate commerce and navigable waters.

The Cherokee Nation not only did not have notice of the servitude, it was led to believe the opposite by extraordinary representations by federal officials, including the president, and by treaty, patent and statutory provisions. In fact, the emergence of the navigational servitude as a legal defense to compensation for damage to property rights had not occurred until after the following critical events in the relationship between the Cherokee Nation and the United States had transpired: the treaty making era between the United States and the Cherokee Nation had concluded; the fee patent had issued with its promise that the Cherokee lands would never be made part of any state or territory; the United States had fully endorsed the exclusive authority of the Cherokee Nation to enact and administer laws regarding navigation on the Arkansas River; Congress had provided that unallotted lands of the Cherokee Nation, including riverbed lands, "shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians . . . ." Act of April 26, 1906, *supra*, and the Oklahoma Enabling Act and the Oklahoma Constitution had disclaimed interest in the Cherokee lands. Throughout that entire course of dealings, the United States never qualified its recognition of the Cherokee Nation's sovereign and proprietary rights in the bed of the Arkansas River. Under these circumstances, the government's belated assertion of its legal authority under the navigational servitude to the detriment of the Cherokee Nation breached its duties under the fair and honorable dealings clause of the Indian Claims Commission Act.[4]

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[4] The Department of the Interior's Solicitor shared this view of the duty of care owed by the federal government to the Cherokee Nation's riverbed title:

> I firmly believe that, had the Supreme Court's pronouncement in *Cherokee Nation v. Oklahoma*, [397 U.S. 620 (1970)] . . .

B. The Court Of Appeals Failed To Take Into Account Principles Of Estoppel In Ruling That The Cherokee Nation Was Not Entitled To Compensation.

Generally, the expansive authority of the navigational servitude cannot be estopped by actions of the federal government. In *Louisville Bridge Co. v. United States*, 242 U.S. 409, 417-18 (1917), the Court stated, however, that it "need not go so far as to say that Congress could not in any case, by contract or estoppel, prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation." [5] That proposition was restated more recently in *Kaiser-Aetna v. United States*, 444 U.S. 164, 172 (1979), and in the disposition of the Fifth Amendment claim in *United States v. Cherokee Nation*, 480 U.S. 700, 704 (1987).

The land involved in *Kaiser-Aetna* underlay a lagoon that was subject to the ebb and flow of the tide and at private expense had been developed into a marina and connected to navigable waters of the United States. The land was not riparian, or fast, land, but it had been declared to be private under state law. 444 U.S. at 179.

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preceded congressional consideration of the construction of the McClellan-Kerr navigation system, the Secretary of the Interior's trust obligation to protect the property interests of Indian tribes would have compelled a request for legislation to compensate the Choctaw, Chickasaw and Cherokee Nations for the destruction of their property interests in the Arkansas Riverbed. The fact that the McClellan-Kerr Project has been constructed and operating for the past 25 years does not make the enactment of such legislative request any less compelling at this time.

Memorandum from the Solicitor to the Secretary 5 (March 15, 1979). Public Law 97-385's authorization of the fair and honorable dealings claims is the kind of compensation legislation to which the Solicitor was referring.

[5] Unlike *Union Bridge* which involved a franchise from a State to construct in navigable waters, the *Louisville Bridge* case involved a claim for compensation based on reliance on an express authorization from Congress to construct a bridge in navigable waters.

Upon inquiry by the marina developers prior to construction, local officials of the Corps of Engineers had stated that improvement of the lagoon into a marina would not make the land subject to federal authority over navigation. In reliance thereon the development proceeded and access to the marina was restricted to those who paid a private fee for its use.[6] In contrast, the United States did not merely decline to exercise jurisdiction over navigation on the Arkansas River in Cherokee territory; it affirmatively represented to the Cherokee Nation and non-Indians alike that permission to engage in commerce on the navigable streams of the Cherokee Nation was to be secured under the laws of the Cherokee Nation.

While estoppel was held not to lie against the United States in the Cherokee Nation's Fifth Amendment claim, 480 U.S. at 704, the court of appeals misapplied that holding to this fair and honorable dealings claim. The actions of the United States in persuading the Cherokee Nation to remove to Oklahoma and in implementing the treaty and patent thereafter created expectancies at least as great as those found persuasive in *Kaiser-Aetna*. In this case it was not mere silence by the United States or its officers, but treaty promises and affirmative actions

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[6] While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land-owner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.

Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (citations and footnote omitted).

by the Congress and the Executive that induced the Cherokee Nation to believe that it was receiving the benefit of its bargain for removal. Thus, consistent with *Louisville Bridge v. United States*, the United States has by contract or estoppel, prevented itself from defeating the fair and honorable dealings claim in this case.

III. THE CONFLICT OF BETWEEN INTERSTATE COMMERCE CLAUSE AND INDIAN COMMERCE AND TREATY CLAUSES REGARDING THE NAVIGATIONAL SERVITUDE SHOULD BE RESOLVED IN FAVOR OF THE FAIR AND HONORABLE DEALINGS CLAIM IN THIS CASE.

Commerce Clause jurisprudence has produced two rules of construction that are squarely in conflict in this case. The first rule concerns Congress' power to regulate foreign and interstate commerce [7]:

> [W]hen private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, . . . the universal rule [is] that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised . . . . "Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the government."

(Citations omitted) *Louisville Bridge Co. v. United States*, 242 U.S. 409, 417-18 (1917).

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[7] It has long since been settled by this Court that under the Commerce Clause Indian tribes are neither States nor foreign nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

The second rule also arises, in part, under the Commerce Clause, but under the phrase empowering Congress to regulate commerce with Indian tribes. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 n. 7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making") (citations omitted); *see also* F. Cohen, *Handbook of Federal Indian Law* 207-12 (1982 ed.). This rule arises out of the special relationship between the Indians and the United States. As was stated in the decision on ownership of the Arkansas River bed:

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor.

Choctaw Nation v. United States, 397 U.S. 620, 630-31 (1970) (citations omitted); *see also* F. Cohen, *supra* 222-24 ("In construing Indian treaties, the courts have required that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as Indians would have understood them. . . . Similar rules of construction have been applied to situations which do not involve treaties. . . . Statutes, agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights." (citations omitted)).

United States v. Cherokee Nation, 480 U.S. 700 (1987), nonetheless rejected the Cherokee Nation's Fifth Amendment claim largely on the basis of the rule of construction relating to congressional authority over for-

eign and interstate commerce. As a matter of law, *Cherokee Nation* concluded that fiduciary principles governing the trust relationship between the United States and the Cherokee Nation were unavailing because

> they do not create property rights where none would otherwise exist but rather presuppose that the United States has interfered with existing tribal property interests. As we have explained, the tribal interests at issue here simply do not include the right to be free from the navigational servitude . . . .

480 U.S. at 707-708.

The fair and honorable dealings cause of action created by Congress in Public Law 97-385 is a new and independent source of liability against which the Cherokee Nation's claim must now be measured. It makes the United States accountable in moral, not legal, terms for its undisclosed reservation of a navigational servitude in the treaties and patent, and the damage resulting therefrom.

> One major exception to the principle that the jurisdictional statutes are not in themselves an independent source of liability is found in the grants of jurisdiction to the Indian Claims Commission in 25 U.S.C. § 70a. This section *expressly created claims in certain areas not otherwise cognizable in law or equity.* Indeed, section 70a(5) specifically envisioned litigation of claims "based upon fair and honorable dealings that are *not recognized by any existing rule of law or equity.*"

F. Cohen, *supra* 568 (1982) (emphasis added).

The fair and honorable dealings cause of action brings the Indian Commerce and Treaty Clauses into play with the navigational servitude, and with them the related rule of construction. The conflict that was absent—because a right was found wanting—in the Fifth Amendment claim now emerges here because Congress has recognized rights based on honor and morality. Application of the conflicting Commerce and Treaty Clauses rules

of construction to this case, however, does not necessarily result in a dilemma. Where different acts of Congress conflict, every effort should be made to accommodate one to the other. "Judges 'are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 60 U.S.L.W. 4067 (U.S. January 14, 1992).

When the constitutional provisions come into conflict in that context, they can be reconciled; the power of the United States to exercise the servitude is unabated, but the injury caused to the tribal beneficiary of the federal trustee in the process should be compensated. While *United States v. Cherokee Nation* found "no support for the existence of such a 'hybrid' navigational servitude in these circumstances," of a Fifth Amendment claim, (480 U.S. at 706, n. 4) the fair and honorable dealings claim warrants a different result and obviates the need to favor one rule, and federal interest, at the expense of the other.

In considering the applicability of the navigational servitude as a defense to this fair and honorable dealings claim, the sharp difference in purpose of the Indian and Interstate Commerce Clauses is critical:

> It is . . . well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, . . . the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . . The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the *unique roles of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.*

Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1989) (citations omitted) (emphasis added). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("differences in the form and nature of [State and tribal] sovereignty make it treacherous to import to one notions . . . that are properly applied to the other").

The court of appeals, nevertheless, stated that it agreed with the district court's conclusion that "the Cherokee Nation has failed to show, *and in fact cannot show*, that the United States has assumed a special obligation to compensate plaintiff for the exercise of the navigational servitude." App. p. 9a (emphasis added). That conclusion is erroneous because, as has been shown, it has no basis in fact and, contrary to *Cotton Petroleum*, it effectively makes the Interstate Commerce Clause preeminent over the Indian Commerce Clause in any case. The court of appeals' conclusion, in effect, makes the fair and honorable dealings cause of action superfluous, a result which the law does not favor. *See Bell v. New Jersey*, 461 U.S. 773, 788-89 (1983) (The Court is reluctant "to construe a statute in a fashion that leaves some provisions superfluous.").

IV. THE COURT OF APPEALS DECISION CONFLICTS WITH THE PRINCIPLES OF MORALITY AND JUSTICE EXPRESSED BY THIS COURT IN UNITED STATES v. REALTY CO. AND BY THE COURT OF CLAIMS IN BURKHARDT v. UNITED STATES.

Article I, section 8 of the Constitution empowers Congress to "pay the debts of the United States." In *United States v. Realty Co.*, 163 U.S. 427 (1896), the Court held that "debts of the United States" included more than those of a strictly legal nature.

The rationale of *United States v. Realty Co.* was adopted by the Court of Claims in a claim for damages resulting from exercise of the navigational servitude. *Burkhardt v. United States*, 84 F. Supp. 553 (Ct. Cl. 1949). The claimants in *Burkhardt* were private land-

owners whom the Supreme Court had held were not entitled to compensation under the Fifth Amendment for loss of power generation capacity in their hydroelectric plant from elevation of water levels in their power plant's tail race caused by the government's construction of navigation works. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945). The *Burkhardt* claimants had no treaty, fiduciary, or other special relationship with the federal government. Yet they were allowed to recover on the basis of the Court of Claims' application of the *Realty Co.* principles to its interpretation of "equitable" claims in 28 U.S.C. § 2509, the congressional reference statute.

The government's defense in *Burkhardt* focused exclusively on the meaning of the phrase "legal or equitable" in 28 U.S.C. § 2509. The government argued that the phrase should be construed in "its strict legal sense and not in a broad general sense meaning 'moral claim'" (84 F. Supp. at 558), and urged the Court of Claims to conclude that the claim was not an equitable one. The Court rejected the government's contention and found that the claimants were entitled to damages.[8]

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[8] [Claimants were] deprived of the use of their property by the United States in the exercise of its paramount right under the Constitution to improve commerce and navigation. But for this superior right the Government would be required to pay "just compensation" for the taking of plaintiffs' property under the Fifth Amendment to the Constitution. Accordingly, plaintiffs do not have a right either in law or in equity to recover compensation from the Government. *However, it does not logically follow that plaintiffs do not have an "equitable" claim against the Government in a broad non-juridical sense* . . . .

The Supreme Court in its opinion, *United States v. Willow River Power Co.*, indicates as much when, in holding that this type of damage alone does not give the courts power to award compensation where there is not an actual taking of property, it points out that, *"Such losses may be compensated by legislative authority, not by force of the Constitution alone."*

84 F. Supp. at 558 (emphasis added) (citations omitted).

The *Burkhardt* court interpreted the authorization to hear an "equitable claim" in 28 U.S.C. § 2509 broadly, holding:

> * * * the term "*equitable* claim" as used in *28 U.S.C.A. § 2509, is not used in a strict technical sense* meaning a claim involving consideration of principles of right and justice as administered by courts of equity, *but the broader moral sense based upon general equitable considerations.*
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> * * *
>
> In this case, plaintiffs actually have *more than a "merely equitable or honorary obligation,* (and) which would not be recoverable in a court of law if existing against an individual."

Id. at 559 (emphasis added).

Following the Court of Claims decision in *Burkhardt*, the decision was reported to the Congress. In recommending payment, the Senate Judiciary Committee acknowledged that the exercise of the navigational servitude by the government against the Willow River Power Company was a "privileged taking" for which the claimants had no *legal* right to relief under the Fifth Amendment to the Constitution. S. Rep. No. 696, 81st Cong., 1st Sess. However, the Committee accepted the Court of Claims interpretation of the term "equitable" in 28 U.S.C. § 2509 as authorizing a determination of liability based on "the equities, humanities, and moral obligations." *Id.* The Committee concluded that "*there is a moral duty upon the Government to reimburse those whom it has damaged. . . . [I]t is not the Government's desire to avoid its moral obligations by hiding behind a constitutional privilege. Payment recommended.*" *Id.* at 2 (emphasis added). The bill was enacted as Private Law 378, 64 Stat. A13. Thus, Congress endorsed the Court of Claims interpretation of 28 U.S.C. § 2509.

V. THE EXPLICIT PROVISIONS FOR RECOVERY IN PUB. L. 97-385 PROVIDE AT LEAST AS BROAD A BASIS FOR RELIEF AS 28 U.S.C. § 2509.

In its order on remand, 948 F.2d 635 (App. p. 18a), the Court of Appeals corrected its erroneous interpretation of *Burkhardt* but remained in conflict with the decision by insisting on a basis for liability in this case that is more restrictive than that in *Burkhardt*. *Burkhardt* found liability on the basis of fairness, honor, and morality within the meaning of "equitable" in 28 U.S.C. § 2509. *Burkhardt* did not even require a finding of a special relationship or wrongdoing by the United States to establish liability; it simply found that the claimants' damages from construction of a dam on the Mississippi River were those which would have been compensable had they been caused by a private party instead of by the government's exercise of the navigational servitude.[9] Congress confirmed that finding of liability and paid the claim. No less a standard than that set forth in S. Rep. 696, *supra*, in *Burkhardt* should be used in assessing the claim of the Cherokee Nation under the explicit provision for fair and honorable dealings claims incorporated in Pub. L. 97-385.

The standards of fairness, honor and morality that were held to be implicit in 28 U.S.C. § 2509 are expressed in Pub. L. 97-385's incorporation of the Indian Claims Commission Act. In creating the fair and honorable dealings claim, Congress intended that no legal defense to such a claim would be a bar to that cause of action. In *Creek Nation v. United States*, 168 Ct. Cl. 483 (1964), the Court reviewed the legislative history of the Indian Claims Commission Act, and noted that the Justice Department had advocated that "against a moral claim . . . no legal defense would be good."

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[9] Unlike the *Burkhardt* claimants, who did not own the land used and occupied by the government in the exercise of its navigational servitude in that case, the Cherokee Nation does own in fee simple the bed of the Arkansas River occupied by the McClellan-Kerr Project.

Also, the Conference Report on the bill establishing the Indian Claims Commission (H.R. 4497) states:

> As stated in the Senate report, this amendment does not permit the raising of legal defenses in cases based on standards of "fair and honorable dealings," for the bill expressly authorizes suit on such claims.

H.R. Rep. No. 2693, 79th Cong., 2d Sess. at 6.

This being true, the sole premise which the Court of Appeals used to affirm the District Court completely fails because the opinion ultimately rests on the legal defense that the Cherokee Nation's ownership of the Arkansas River bed is subject to the navigational servitude. The Court of Appeals cites the Supreme Court's decision on the Cherokee Nation's legal claim in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987), in support of its analysis. But the premise of the Indian Claims Commission causes of action is that they are not meant to be subject to the legal defense upheld in that case.

When it created the fair and honorable dealings cause of action, which is available only to Indian tribes, Congress was exercising its political function. *Otoe and Missouria Tribe of Indians v. United States*, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955). *See also United States v. Seminole Nation*, 173 F.Supp. 784 (Ct.Cl. 1959). (The Indian Claims Commission Act was "designed to help erase certain evils of longstanding" by creating new causes of action.) Congress acted similarly when it established the "equitable" cause of action in 28 U.S.C. § 2509. *See Glosser, Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 Am. U.L. Rev. 595, 618 (1976) note 3.

Section 2509, as construed by *Burkhardt* should inform the analysis of Pub. L. 97-385. When Pub. L. 97-385 was enacted, the *Burkhardt* standard had not only been determined by the Court of Claims, it had been endorsed by the jurisdictional committees and the Con-

gress in its deliberations on the post-*Burkhardt* payment legislation. Private Law 378, 64 Stat. A13. Payment was authorized on the basis of the "equities, humanities, and moral obligations" that the Court of Claims found inhered in the meaning of "equitable" in 28 U.S.C. § 2509 because it was not "the Government's desire to avoid its moral obligations by hiding behind a constitutional privlege." S. Rep. No. 696, *supra* at 2.

In view of this background, Congress could not have intended 28 U.S.C. § 2509 to have a more liberal standard for relief than Pub. L. 97-385. In other words, there is no logic to support either the conclusion by the Court of Appeals that the *Burkhardt* analysis is immaterial to its decision in this case, or its implication that the Cherokee Nation would have been better positioned with its claim had it been referred to the Claims Court by the resolution of a single House of Congress and pleaded under the principles of equity in 28 U.S.C. § 2509 instead of using the authority of Pub. L. 97-385. Accordingly, the conflict created by the Court of Appeals with the principles established by this Court in *United States v. Realty Co.* and adopted by the Court of Claims in *Burkhardt* should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1112

CHEROKEE NATION OF OKLAHOMA,
Plaintiff-Appellant,
v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 83-306-C)

[Filed Jul. 9, 1991]

James G. Wilcoxen, Wilcoxen & Cate, Muskogee, Oklahoma (Paul M. Niebell, Washington, D.C., was also on the brief) for Plaintiff-Appellant.

Maria A. Iizuka, Department of Justice, Washington, D.C. (Roger J. Marzulla, Assistant Attorney General, Washington, D.C.; Roger Hilfiger, United States Attorney and Ralph Keen, Assistant United States Attorney, Muskogee, Oklahoma; Pauline H. Milius and Edward J. Shawaker, Department of Justice, Washington, D.C.; and Wh[illegible] Field, Office of the Solicitor, Department of the

Interior, Washington, D.C., were also on the brief) for Defendant-Appellee.

Before HOLLOWAY, Chief Judge, SEYMOUR, Circuit Judge, and BROWN, District Judge.*

HOLLOWAY, Chief Judge

I

This action was brought by the Cherokee Nation pursuant to a special jurisdictional grant to the Court of Claims or the United States District Court for the Eastern District of Oklahoma. Pub. L. No. 97-385, 96 Stat. 1944-45 (1982).[1] The complaint was filed in the Eastern District of Oklahoma stating two theories of recovery

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* The Honorable Wesley E. Brown, United States District Judge for the District of Kansas, sitting by designation.

[1] The pertinent portion of the Act, which was approved December 23, 1982, reads as follows:

> That (a) notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946, as amended (the Indian Claims Commission Act, 60 Stat. 1049, 1052; 25 U.S.C. 70k), jurisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Oklahoma, to hear, determine, and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commission Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a) on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and powerheads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation; . . . .

sought for damages to assets of the Cherkoee Nation resulting from actions of the United States Army Corps of Engineers in constructing the Arkansas River Navigation System.

The damages were alleged to have occurred on lands of the Cherokee Nation, consisting of a portion of the riverbed of the Arkansas River in Oklahoma. The first claim was for a taking without just compensation in violation of the Fifth Amendment. The second claim was for violation of the principles of fair and honorable dealings between the United States and the Cherokee Nation, grounded on the "fair and honorable dealings" clause of the Indian Claims Commission Act, 60 Stat. 1050, 25 U.S.C. § 70a(5) (1976).[2] More specifically, the Cherokee Nation claims that the Corps of Engineers altered the natural channel of the riverbed, destroyed sand and gravel assets, rendered oil, gas and coal deposits inaccessible, and constructed dams in the riverbed, two of

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[2] The pertinent portion of the statute provided:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and *(5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.* . . .

(emphasis added).

which are generating electricity for profit, although not inuring to the benefit of the Cherokee Nation.[3] Brief of Appellant at 5-6.

The district court granted partial summary judgment for the Cherokee Nation on the taking claim and an interlocutory appeal was granted by this court, resulting in an affirmance by this court of the ruling favorable to the Cherokee Nation on the taking claim, one judge dissenting. *Cherokee Nation of Oklahoma v. United States*, 782 F.2d 871 (10th Cir. 1986), *rev'd*, 480 U.S. 700 (1987). The Supreme Court reversed, holding that the tribal interests at issue did not include the right to be free from the navigational servitude of the United States and that exercise of the servitude was not an invasion of any private property rights in the stream or the lands underlying it. *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707-08 (1987). As the Court noted in its opinion, the district court had addressed only the taking claim, and had not ruled on the fair and honorable dealings claim; the court of appeals accordingly did not consider that claim and it was not before the Supreme Court. *Id.* at 702 n.1.

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[3] The Supreme Court had earlier determined that treaties between the Cherokee, Chickasaw and Choctaw Tribes and the United States granted to the tribes fee simple title to the riverbed underlying specified portions of the Arkansas River in Oklahoma. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The Court held that in grants it made to the Cherokee, Choctaw and Chickasaw Nations, the United States conveyed title to the bed of the Arkansas River below its junction with the Grand River in Oklahoma within the present State of Oklahoma. *Id.* at 635-36. It was later determined with respect to the portion of said riverbed from the confluence of the Canadian River and the Arkansas River to the Oklahoma-Arkansas boundary line that the Cherokee Nation owned the north half of the riverbed, and that the south half of the riverbed was owned by the Choctaw and Chickasaw Nations; that with respect to said south half of the riverbed from the Canadian fork to the Arkansas-Oklahoma boundary, the Choctaw Nation had an undivided $^3/_4$ interest and the Chickasaw Nation had an undivided $^1/_4$ interest. *Choctaw Nation v. Cherokee Nation*, 393 F.Supp. 224, 226, 246 (E.D. Okla. 1975).

On remand, cross motions were made for summary judgment and the district court decided the remaining fair and honorable dealings claim, with the issues of liability and damages respecting that claim being bifurcated. The parties agreed, and the district court found, that there were no disputed issues of fact and the claim was resolved on the submitted cross motions for summary judgment and supporting briefs. The district judge held that the Cherokee Nation had failed to establish that any special obligation or undertaking to the Cherokee Nation had been assumed by the United States by treaty, statute, agreement or representations. Since the Cherokee Nation could not establish that first required element of a fair and honorable dealings claim, summary judgment was granted for the United States in an unpublished order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment. I R. Doc. 14 at 3-5. This appeal by the Cherokee Nation followed.

II

A.

First, we address the proposition of the Cherokee Nation that the district court erred in failing to find that a special fiduciary relationship did exist between the Cherokee Nation and the United States which gave rise to a moral obligation to compensate the Tribe. Brief of Appellant at 16.

In *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831, 838-39 (Ct.Cl. 1973), in upholding the sufficiency of allegations stating a claim for breach of fair and honorable dealings, the court thus stated the test for establishing a fair and honorable dealings claim:

> The cases of *Gila River Pima-Maricopa Indian Community, supra*; Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967), and Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl.

> 487, cert. denied, 379 U.S. 946, 85 S.Ct. 411, 13 L.Ed.2d 544 (1964), set out in holdings or dicta criteria for a claim of breach of fair and honorable dealings. *There must be a showing that the United States undertook an obligation, a 'special relationship', the obligation was to the Tribe, that the United States failed to meet its obligation, and that as a result the Tribe suffered damages.*

Id. at 838-39 (emphasis added).

The Cherokee Nation vigorously argues that the entire history of its treatment by the government is relevant in connection with the fair and honorable dealings claim. Building on this argument, it is contended that due to the removal of the Cherokee to the Indian Territory in Oklahoma and the granting of title to the riverbed to the Cherokee, the whole of the circumstances establishes a special relationship within the test laid down in *Aleut Community.*

More specifically, the Cherokee Nation argues that its claim of violation of the fair and honorable dealings clause is shown by a series of treaties and subsequent violations of the government's obligations thereunder. It says that by treaties of 1828, 1833 and 1835 and the patent of 1838, the United States repeatedly assured the Cherokee Nation that their new home in the west would be theirs "forever." Brief of Appellant at 17. They rely on the Treaty with the Cherokees of 1828, 7 Stat. 311, under which Cherokee lands in Arkansas were to be exchanged for over 7 million acres of land in the Indian Territory, now the State of Oklahoma, and an outlet to the west, under which the United States "agree to possess the Cherokees, and that guarantee is solemnly pledged." *Id.* at 7. The 1833 treaty relied on settled a boundary dispute between the Cherokees and Creeks relating to their western domains and did again "agree to possess the Cherokees, and that guarantee is hereby pledged." Treaty with the Western Cherokee, Art. 1, 7 Stat. 414. The 1835

Treaty referred to imposed the Treaty of New Echota, 7 Stat. 478, on the Cherokee Nation, forcing the Cherokees to cede to the Untied States their remaining lands in the east and their removal to and uniting with the Western Cherokees on lands described in the treaty. The government agreed with the Cherokee Nation that it would have the right of self-government in its domain which would "in no future time without their consent, be included within the territorial limits or jurisdiction of any state or territory." Art. 5. The series of treaties culminated in a patent from President Van Buren conveying to the Cherokee Nation over 14 million acres of land in the northeast quadrant of the present State of Oklahoma, providing that the Cherokee Nation should "HAVE AND HOLD THE SAME . . . FOREVER." Brief of Appellant at 8-10.

The Cherokee Nation maintains that there was a fundamental change in contravention of the promises of the treaties effected by the Curtis Act of 1898, 30 Stat. 495, forcing the Indians to be placed on tribal rolls and providing for the division of tribal lands and assets among the members thereof, with abolition of tribal courts and the extension of federal jurisdiction over all disputes among members of the tribes. Brief of Appellant at 17-18.

On the basis of these historic wrongs the Cherokee Nation maintains that it has demonstrated a special relationship. In particular, the Cherokee Nation argues that when the United States "so completely took over the management of the affairs and property of the Five Civilized Tribes, it established a special relationship with the tribes giving rise to an obligation to manage their remaining limited property interests for their benefit." Brief of Appellant at 22.

We agree that we should consider the background of statutes, treaties and any representations made to the Cherokee Nation to determine whether the requisite show-

ing is made of a "special relationship" as an element of the fair and honorable dealings claim. This special relationship must, however, be one with a nexus to the actions complained of relating to the Arkansas River Navigation System.[4] This is because the jurisdictional grant under which this suit has proceeded defines the claim to be considered as one "for any and all damages to the Cherokee Tribal assets *related to and arising from construction of the Arkansas River Navigation System . . . .*" *See* Pub. L. No. 97-385, 96 Stat. 1944-45 (1982) (emphasis added), quoted in n.1. Thus, the purpose of the jurisdictional grant is clearly to afford relief for violations of the rights of the Cherokee Nation, including their rights under the fair and honorable dealings clause, arising from the government's actions in the construction and operation of the Arkansas River Navigation System.

Therefore, we do consider the historical events outlined for the purpose of determining whether a "special relationship" was created with a nexus to the construction and operation of the Navigation System complained of. However, this suit may not be entertained for the purpose of affording general relief for wrongs to the Cherokee Nation through the long and tragic history relied on. "The [Indian Claims Commission] Act was not designed to grant compensation for all the detriment accruing to the Indians by our ongoing policy toward them but, rather, had the more limited goal of paying for specific deprivations of land or property or rights protected by treaty, statute, or then-existing law." *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194, 1200-01 (Ct.Cl.) (Davis, J., concurring), *cert. denied*, 400 U.S. 819 (1970).

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[4] To determine whether the remaining elements of the claim are established—a failure of the government to meet its obligation and damages—one must focus on the conduct of the United States in connection with the construction and operation of the Navigation System.

With these parameters in mind, we are not persuaded that the requisite special relationship has been shown. We agree with the district judge who concluded that the Cherokee Nation "has failed to show, and in fact cannot show, that the United States has assumed a special obligation to compensate plaintiff for the exercise of its navigational servitude." Order at 5. While the Supreme Court did not consider or decide the merits of the fair and honorable dealings claim in *United States v. Cherokee Nation of Oklahoma*, *supra*, its opinion there makes unmistakably clear the recognition of the constitutional right of the government to exercise its navigational servitude arising from the Commerce Clause with respect to the Arkansas riverbed, despite the ownership of a portion of that riverbed by the Cherokee Nation. 480 U.S. at 706-08. The Court concluded:

> [W]e have repeatedly held that the navigational servitude applies to *all* holders of riparian and riverbed interests. . . .
>
> . . . As we have explained, the tribal interests at issue here simply do not include the right to be free from the navigational servitude, for exercise of the servitude is 'not an invasion of any private property rights in the stream or the lands underlying it . . . .' *United States v. Rands*, 389 U.S., at 123.

Id. at 707-08. (Emphasis in original).[5]

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[5] We note in this connection the opinion of the Claims Court in *Confederated Tribes of Colville Reservation v. United States*, 20 Cl. Ct. 31 (1990). There the Indian Tribes sought compensation for water power values of tribal lands taken and used by the government in construction of the Grand Coulee Dam and the Franklin D. Roosevelt Reservoir. Claims were asserted of the same nature as those of the Cherokee Nation here. The court rejected them on the ground that the dominant navigational servitude of the government had been exercised so that no liability on any of the theories asserted existed. The court concluded that:

> [W]e must decide whether, notwithstanding the proper exercise of navigational servitude, any of the theories upon which the

In *Confederated Tribes of Colville Reservation v. United States*, 20 Cl.Ct. 31 (1990), the Claims Court found the Supreme Court's decision in *Cherokee Nation* to be "extremely persuasive, if not dispositive, on the issues asserted by the Tribes here," which included issues relating to a fair and honorable dealings claim. *Id.* at 46; *see* note 5, *supra*. We must agree. In *Cherokee Nation*, 480 U.S. at 708, the Court relied on its earlier decision in *United States v. Rands*, 389 U.S. 121, 123 (1967), which had held that "the proper exercise of this power [to regulate navigation] is not an invasion of any private property rights in the stream or the lands underlying it." The Cherokee Nation here demonstrates no reason why

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> Tribes have premised their claims for compensation will subordinate the defendant's navigational servitude defense. We hold that they do not. Why? Simply because the constitutional power to assert the navigational servitude is dominant over any and all interests when it is properly exercised through an appropriate manifestation of congressional intent, as here in the Rivers and Harbors Act of August 30, 1935. . . . Therefore, we hold that the navigational servitude, having been fully and properly exercised by Congress, exonerates the defendant from any obligation to pay additional compensation to the Tribes under any and all of the theories presented here.

Id. at 47. More specifically, with respect to the fair and honorable dealings claim the court observed:

> [I]t is obvious that Congress did not surrender any right to assert its sovereign powers under the Commerce Clause, much less the power to exercise the navigational servitude over Indian lands, in either explicit or implicit terms when it enacted the fair and honorable dealings clause of the ICCA.
>
> . . . .
>
> Clearly, no matter whether the fair and honorable dealings clause of the ICCA is construed liberally or strictly, the tribes have no right to recover for water power values upon the defendant's proper assertion of the navigational servitude. There is clearly no authority to suggest that Congress intended such a result when it enacted the ICCA, nor have the plaintiffs cited to any legislative history which produced the Act tending to support such an intent.

Id. at 50.

the exercise of the government's power to regulate navigation was not proper in the construction and operation of the Arkansas River Navigation System, other than by its general assertion of a violation of the fair and honorable dealings clause. We feel that this is not enough. More fundamentally, the Cherokee Nation has failed to demonstrate that in some way the government undertook a special relationship such that it would forego or restrict its historic rights under the Commerce Clause so that the government was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise.

The Cherokee Nation relies upon *Heckman v. United States*, 224 U.S. 413, 437 (1912), to support its position that a special relationship exists in the instant circumstances. Reliance is placed on the Court's statements concerning the guardianship of the United States with respect to the Five Civilized Tribes. In *Heckman* the Court held that the United States had a distinct interest in the maintenance of suits to cancel conveyances by members of the Tribes in violation of restrictions on alienation imposed for the protection of the Indians with respect to their allotments; that statutory provisions authorizing suits to be brought on recommendation of the Secretary of the Interior did confer authority to bring such suits so that the United States had the capacity to prosecute them. *Id.* at 437, 443-44. The Court's opinion noted that out of the government's "peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.' *United States v. Kagama*, 118 U.S. 375, 384." *Id.* at 437.

We are not persuaded that *Heckman* supports the argument that a "special relationship" exists here for purposes of enforcing a claim under the fair and honorable dealings clause. In *Heckman*, there were specific statutory provisions made for the imposition of restrictions on alienation for the benefit of the allottees, and there were clear statutory provisions for the maintenance of suits to enforce the restrictions on alienation. Both from the statutory restrictions on alienation, and from the statutory recognition of the right to bring cancellation suits, a basis for the obligations of the government was evident. Here, on the contrary, there is no basis identified for the recognition of a "special relationship" under which the government obligated itself to forego or restrict the exercise of its historic and dominant navigational servitude which Congress decided to exercise in authorizing the construction of the Arkansas River Navigation System. Nor is there a showing that in the governmental actions in connection with that System, the government undertook an obligation to make compensation to the Cherokee Nation.

Further we note the argument of the Cherokee Nation that the government continued to hold in trust lands belonging to the Five Civilized Tribes pursuant to the statutory provisions in the Act of 1906, 34 Stat. 137, 148; that the Act provided thus that remaining Cherokee lands, which included the riverbed property, were to continue to be held in trust by the government for the use and benefit of the Cherokee Nation as a part of their tribal property; and that the government has thus taken over full administrative control under the Curtis Act, the 1902 Cherokee Agreement and other Acts. These circumstances are particularly relied on as demonstrating a "special relationship" as a basis for the fair and honorable dealings claim.

We are not convinced that the showing made by the Cherokee Nation establishes a "special relationship" that

will sustain a fair and honorable dealings claim. We find no indication in the materials relied on that the government undertook to restrict the exercise of its navigational servitude in the Arkansas riverbed in question, or to compensate the Cherokee Nation for any of the effects of the navigation projects of the Arkansas River Navigation System.

This case is unlike *Aleut Community of St. Paul Island*, *supra*, relied on by the Cherokee Nation. There the court held the averments sufficient to state a fair and honorable dealings claim. The Aleut complaint, however, alleged assurances to the Indians by government agents of their rights to bargain freely in selling their labor and products; that statutory provisions guaranteed them the privilege of killing seals necessary for food and clothing; that control over hunting was placed in the hands of the Secretary of Commerce and the statutes recognized the Indians' dependence on killing of seals for their survival; that the statutes assured fair compensation for their labor; and that the Secretary was given authority to furnish food, shelter and the like. Further the complaint alleged that the Indians were denied their right to trade in furs with anyone but the monopolies on the Islands; that in practice they were denied the ability to survive from the hunt; they were threatened with banishment if they left St. Paul Island, while historically they would travel from island to island because no one island was able to support the native population. The court concluded that a special relationship and failure of the government in its obligations to the tribe were stated.

Obviously, there is a sharp difference between the affirmative obligations undertaken to the Aleut Indians and the general claims of a "special relationship" being relied on by the Cherokee Nation here. If particular activities or interests of the Cherokee Nation had been specifically protected by statutes and representations of the government, like those of the Aleut Indians, and then the Navigation System had disrupted the Cherokee Nation's pro-

tected activities, a violation of a special relationship might be shown. But that is not the case here where, instead, general allegations are made as to the breach of a special relationship based on the government's exercise of its navigational servitude.

Nor is the fair and honorable dealings claim upheld in *Seminole Nation of Oklahoma v. United States*, 492 F.2d 811 (Ct. Cl. 1974), supportive of the Cherokee Nation's position here. In *Seminole Nation* the court held that the Indian Claims Commission erred in rejecting one part of the Indians' fair and honorable dealings claim. There Congress had transferred to the municipality of Seminole, Oklahoma, abandoned station reservation property that belonged to the Seminole Nation which held a residual fee title. An earlier decision of the Supreme Court denied liability under existing treaties and legislation, but this was held not to preclude the fair and honorable dealings claim for transfer of the Seminole Nation's property without fair compensation. Here there is no such transfer of property from the Cherokee Nation to others, only the exercise of the government's dominant right to exercise its navigational servitude against holders of riparian and riverbed interests. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. at 706-08.

B.

Second, we turn to the argument of the Cherokee Nation that the district court erred in applying the navigational servitude, a legal power, to defeat a claim based on a moral duty. Brief of Appellant at 29. We agree that the servitude is not in all instances a bar to a fair and honorable dealings claim, but we are convinced that the government's right to proper exercise of its navigational servitude should be given consideration as an important factor in this case.

A fair and honorable dealings claim will not necessarily be barred in every instance by Congress' constitutional

power with respect to navigational servitudes. We simply hold that in this case the requisite "special relationship" between the government and the Cherokee Nation has not been sufficiently established to demonstrate that the government's exercise of the servitude here was a violation of any special obligations to the Tribe. We are persuaded that a claim like that presented here for compensation under the fair and honorable dealings clause cannot be determined without a judicial inquiry into the facts and circumstances of each case. *See* H.R. Rep. No. 453, 97th Cong., 2d Sess., pt. 1, at 3 (1982) (noting the Department of the Interior's reliance on the navigational servitude as a blanket bar to relief and remarking that "the issue of compensation . . . is appropriate for adjudication by the courts").

The Cherokee Nation relies on *Burkhardt v. United States*, 84 F. Supp. 553 (Ct. Cl. 1949), to overcome the effect of Congress' exercise of the navigational servitude here. We find this reliance to be misplaced. In *Burkhardt*, after the Supreme Court had rejected plaintiffs' traditional legal claims in reliance on Congress' navigational servitude, plaintiffs successfully advanced considerations of morality and honor before the Court of Claims as the basis for relief against the government for loss of hydroelectric power caused by the government's construction of a dam. There, however, Congress had expressly undertaken, following the Court's decision rejecting the traditional legal claims, to compensate plaintiffs and had appropriated funds for this purpose. 84 F. Supp. at 556. In essence, Congress had limited the effect of its exercise of the navigational servitude to afford relief to plaintiffs that would not otherwise have been possible. *See Colville*, 20 Cl. Ct. at 51 (distinguishing *Burkhardt* on the ground that there Congress expressly granted authority to the court to "subordinate" its navigational rights under the Constitution). Plaintiffs' claims were expressly referred to the Court of

Claims by Congress, principally for a recommendation as to the *amount* that would constitute fair and reasonable compensation.

No such congressional undertaking or reference is evident here. Specifically, in enacting Pub. L. 97-385 Congress did not appropriate funds for the satisfaction of the Cherokee Nation's claims arising from the construction and operation of the Arkansas River Navigation System. That is, in enacting the statute, Congress did not expressly limit the effect of its exercise of the navigational servitude. Instead, it provided the Cherokee Nation with forums for the adjudication of their claims. *See Cherokee Nation of Oklahoma: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, H.R. 2329*, 97th Cong., 1st Sess. 30 (1981) (statement of Congressman Mike Synar) (noting that "[w]e are wanting the right to ask the court [whether relief is available despite Congress' exercise of the navigational servitude]; not the outright payment of compensation"). The courts were charged under the statute with determining, not only what compensation (if any) was appropriate, but whether the claims could prevail at all. Accordingly, contrary to the situation in *Burkhardt*, the district court in adjudicating the Cherokee Nation's fair and honorable dealings claim was required to evaluate the facts and circumstances of the instant case in light of the prevailing standards, including standards related to Congress' exercise of its navigational servitude. Its ruling in favor of the government reflects a correct determination that these standards were not satisfied.

What we have said above concerning the legislative provisions and their history responds to the third proposition urged by the Cherokee Nation—that it was the intention of Congress that the Nation be accorded a special right to sue and that this right transcends the bounds of law and equity. Brief of Appellant at 35. We agree

that Congress intended the Nation to have the full panoply of remedies—legal, equitable and moral—laid out in the five clauses of the Indian Claims Commission Act (25 U.S.C. § 70a). *See* note 2, *supra*. That does not mean, however, that recovery by the Nation was automatically intended. The Cherokee Nation still had the burden of establishing the elements of those claims and, for reasons we have expressed, we must agree with the district court's conclusion that the fair and honorable dealings claim has not been established here.

III

Having considered all the grounds urged by the Cherokee Nation, we hold that a violation of the fair and honorable dealings clause has not been made out with respect to the government's construction and operation of the Arkansas River Navigation System. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1112

CHEROKEE NATION OF OKLAHOMA,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

[Filed Oct. 25, 1991]

Before HOLLOWAY and SEYMOUR, Circuit Judges, and BROWN, District Judge.*

Plaintiff-appellant Cherokee Nation of Oklahoma petitions for rehearing and rehearing en banc. It makes two principal contentions of error. First, the Cherokee Nation contends that the panel's rejection of its "fair and honorable dealings" claim was premised in part on a misreading of *Burkhardt v. United States*, 84 F.Supp. 553 (Ct. Cl. 1949). Second, the Cherokee Nation contends that the panel overlooked treaty history and the course of

* Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

dealings between it and the United States that unequivocally demonstrate that a special relationship existed between the parties with respect to the government's exercise of its dominant navigational servitude. Although the Cherokee Nation's two main contentions merit some discussion, the panel concludes that the petition for rehearing should be denied.

The Cherokee Nation asserts that the panel overlooked background of the *Burkhardt* decision and misapprehended certain key facts in that case. In particular, it asserts that the factual grounds on which the panel distinguished *Burkhardt* were without foundation. It says that contrary to the suggestion of the panel opinion, when Congress referred the *Burkhardt* case to the Court of Claims, Congress had not already determined that the government should be liable for some amount and appropriated funds for this purpose; and that actually the court's task under the reference involved consideration of the merits of the claimants' action, and not just the issuance of a recommendation with respect to a fair and reasonable amount of compensation. According to the Cherokee Nation, the panel's faulty reading of *Burkhardt* led it to reject its "fair and honorable dealings" claim; in fact, the Court of Claims ruled in *Burkhardt* that claimants could permissibly assert factors of morality and honor under 28 U.S.C. § 2509's provision for "equitable" claims, and that these factors could provide the basis for relief against the government, even though it had elected to exercise its dominant navigational servitude. Likewise, says the Cherokee Nation, considerations of morality and honor underlying its "fair and honorable dealings" claim should override Congress' exercise of its navigational servitude here and permit relief. The Cherokee Nation argues that in *Burkhardt* there was no showing of a special relationship between the claimants and the government, and it says that Congress did not intend the special jurisdictional grant here in Pub. L. 97-385 (*see* our panel opinion, 937

F.2d at 1540 n.1) to constitute a more restrictive ground for relief than 28 U.S.C. § 2509, which applied in *Burkhardt*.

After thorough consideration of the Cherokee Nation's arguments, the panel concludes that it did misinterpret the factual circumstances underlying the *Burkhardt* case. In doing so, it was guided in part by the Claims Court's decision in *Confederated Tribes of the Colville Reservation v. United States*, 20 Cl. Ct. 31 (1990). The *Colville* court stated that Congress in *Burkhardt* "passed legislation authorizing the Secretary of the Treasury to pay compensation for the specific injuries earlier rejected by the [Supreme] Court" and observed that the primary issue in that case was "whether Congress had the authority to create a new cause of action and appropriate funds to pay" the claim. 20 Cl. Ct. at 51. We note that in fact, in *Burkhardt* the United States Senate had merely passed a private bill on behalf of the claimants, outlining possible terms of compensation, and referred the matter to the Court of Claims by Senate Resolution 231 of May 24, 1948. Absent enactment into law, the private bill did not determine the liability question, or damages, and no funds had been appropriated. Thus, it is true that the court's role in *Burkhardt* under the reference was not limited to a recommendation of a fair and reasonable amount of compensation. *See* Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 Am. Univ. L. Rev. 595, 601, 606-07, 627-28 (1976) (offering "a word of caution" that "[t]he mere passage of a congressional reference bill by a House of Congress does not mean that it has decided the question of liability in favor of the plaintiff").

In *Burkhardt*, the Court of Claims rendered its opinion in response to S. Res. 231. The opinion found that the term "equitable claim" as used in 28 U.S.C. § 2509 was not used in a strict technical sense but in a broader moral sense based on general equitable considerations; that with

respect to Congress' power in Article 1 "to pay the debts" of the United States, debts include not merely those evidenced by a written obligation, but also debts or claims resting on a merely equitable or honorary obligation; that in *Burkhardt*, the "plaintiffs actually have more than a 'merely equitable or honorary obligation, (and) which would not be recoverable in a court of law if existing against an individual' "; that in the court's view, whether these or other plaintiffs are to be compensated by the government for the taking of their property is a matter exclusively for the determination of Congress; that $25,000 would be fair and reasonable compensation for the loss and damage of plaintiffs; and that 4½% per annum would be a reasonable rate of interest. This opinion was ordered transmitted to the Senate. 84 F.Supp. at 559-560.

We wish to correct our opinion's statement, 937 F.2d at 1547, on these matters and *Burkhardt*, but this does not alter the result here. The Cherokee Nation cites no authority which holds that the standard for granting relief on a fair and honorable dealings claim under Pub. L. 97-385 (referencing the Indian Claims Commission Act, 60 Stat. 1049, 1050, and its jurisdictional provisions which include fair and honorable dealings claims) is free of the requirement of showing a special relationship as a premise for recovery on such a claim. *See Aleut Community of St. Paul Island v. United States*, 480 F.2d 831, 838-39 (Ct. Cl. 1973). To prevail on its claim under Pub. L. 97-385, therefore, the Cherokee Nation still was required to establish, *inter alia*, the existence of a special relationship between it and the government as a premise for liability here. This the Cherokee Nation has not done.

The Cherokee Nation argues to the contrary, however, in its second contention for rehearing. It says that it demonstrated a course of dealing with the government relative to the navigation of waters under its control which was founded on the express terms of certain treaties and reflected in various documents. This course of deal-

ing allegedly engendered the requisite special relationship between it and the government. In the cited treaties, the Cherokee Nation primarily underscores language indicating that the government perceived the need to specifically provide for the right of individual United States citizens to navigate waters under Cherokee Nation control. In the cited documents, the Cherokee Nation primarily points to language indicating that the government recognized the Cherokee Nation's authority for some regulation of commerce on waterways under its control and, in some cases, actively facilitated this regulation. Even considering the limited functions exercised by the Cherokee Nation respecting the waterways and the other matters argued, we cannot agree that this course of dealing gave rise to the requisite special relationship.

More specifically, we do not agree that by this course of dealing the government, in effect, consented to forego or restrict its historic rights under the Commerce Clause such that it was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise. *Cherokee Nation of Oklahoma v. United States*, 937 F.2d 1539, 1544 (10th Cir. 1991); *see also United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987) (even when sovereign states gain absolute right to navigable waters and soil under them, this right is unquestionably subject to paramount power of the United States to insure that waters remain free to interstate commerce).

Accordingly, the Cherokee Nation's petition for rehearing is DENIED. In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en

banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is DENIED.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 83-306-C

CHEROKEE NATION OF OKLAHOMA,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[Filed Dec. 22, 1987]

This action arises from the construction of a series of locks and dams by the Army Corps of Engineers on the Arkansas River on lands owned in fee simple by the Cherokee Nation. Plaintiff seeks compensation for damage to its riverbed interests resulting from the McClellan-Kerr Navigation Project approved by Congress in the River and Harbor Act of July 24, 1946, 60 Stat. 634, 636.

Initially, two theories of recovery were presented to this court by plaintiff. The first theory alleged that the construction of the McClellan-Kerr Navigation Project constituted a Fifth Amendment taking of plaintiff's property requiring just compensation. By order dated June 6, 1984, this court granted plaintiff's motion for summary judgment finding that defendant's actions "amount to a taking of private property and it must pay just compensation to the Cherokee Nation, the fee title owner, under the Fifth Amendment to the Constitution of the United States." *Cherokee Nation of Oklahoma v. United*

States, No. 83-306-C, p. 3, (E.D. Okla. June 6, 1984) (citation omitted). This court further found that the United States could not avoid payment of just compensation by claiming the existence of its navigational servitude since such navigational servitude "was not reserved to the United States under the treaty [Treaty of New Echota 7 Stat. 478 (December 29, 1835)] and patent." *Id.* The Tenth Circuit Court of Appeals affirmed on different grounds. *Cherokee Nation of Oklahoma v. United States*, 782 F.2d 871 (10th Cir. 1986). The United States Supreme Court reversed the decision of the Court of Appeals in its opinion of March 31, 1987. *United States v. Cherokee Nation of Oklahoma*, 107 S.Ct. 1487(1987). The Supreme Court found that the United States has not waived its navigational servitude in the Arkansas River and that "[t]he proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interest of riparian owners have always been subject." *United States v. Cherokee Nation of Oklahoma* 107 S.Ct. at 1490 (quoting *United States v. Rands*, 389 U.S. 121, 123 (1967)). Further, the Supreme Court found no distinction in plaintiff's ownership of the riverbed interests by fee simple title or its claimed exemption from the navigational servitude due to its unique position as a sovereign nation. *Id.* at 1492.

Plaintiff's second theory of recovery concerning fair and honorable dealings was not before the Supreme Court because this court did not address such theory and certified plaintiff's Fifth Amendment taking claims for interlocutory appeal under 28 U.S.C. § 1292(b).

The parties are now before this court to resolve plaintiff's second and final theory of recovery. Plaintiff's final theory is grounded in Section 2, Clause 5, of the Indian

Claims Commission Act (Act), 60 Stat. 1050, 25 U.S.C. § 70a(5) which authorized the Indian Claims Commission (Commission) to hear and determine "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Jurisdiction was conferred on this court, pursuant to Public Law 97-385, 97th Congr., 96 Stat. 1944, to determine claims brought by the Cherokee Nation against the United States under Section 2 of the Act for damages resulting from the construction of the McClellan-Kerr Navigation Project.

The parties have stipulated to the submission of this claim for resolution by cross-motions for summary judgment. They have also agreed to the bifurcation of the issues of liability and damages. The parties agree, and the court finds, that there exist no disputed issues of fact and that this case is ripe for resolution in accordance with the submitted cross-motions for summary judgment and the supporting briefs.

In order to establish a fair and honorable dealings claim under Section 2 of the Act, plaintiff must establish 1) a special obligation or undertaking to plaintiff assumed by the United States by treaty, statute, agreement, or representations, 2) that the United States failed to meet its obligation, and 3) that plaintiff was damaged. *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194, 1199 (Ct. Cl. 1970), *cert. denied*, 400 U.S. 819 (1970); *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831, 839 (Ct. Cl. 1973); *Choctaw Nation v. United States*, 2 Ind. Cl. Comm. 597, 615 (1954). This special relationship must be specific in nature and the scope of the underlying obligation cannot be amorphous. General references to "guardianship" or "trust" status in treaties or agreements entered into between tribes and the United States are not sufficient to establish the special obligation required for a fair and honorable dealings claim. To allow such general references to supply the foundation for a fair and honor-

able dealings claim would result in the unintended compensation "for all the detriment accruing to the Indians by our ongoing policy toward them." *Gila River Pima-Maricopa Indian Community v. United States*, 429 F.2d at 1200 (Davis, J., concurring).

Plaintiff is unable to establish any special obligation on the part of the United States concerning compensation for the United States' exercise of its navigational servitude in the construction of the McClellan-Kerr Navigation Project. Plaintiff relies on the entire history of dealings between the Cherokees and the United States to establish a special obligation for its fair and honorable dealings claim. Reliance is also placed on the United States' promise to hold the riverbed in trust "for the use and benefit" of the Cherokees. Act of April 26, 1906, 527, 34 Stat. 148.

While the history of dealings between the Cherokees and the United States was sufficient to evidence conveyance of title to the Cherokees to the riverbed underlying the Arkansas River, *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), the same does not evidence a waiver of the United States' exercise of its navigational servitude in the river. Indeed, the Supreme Court found that plaintiff "can point to no such terms" which clearly indicate that the United States has waived its navigational servitude in the Arkansas River. *United States v. Cherokee Nation of Oklahoma*, 107 S.Ct. at 1492. Without such waiver or other indicia of intention on the part of the United States to compensate plaintiff for its exercise of its navigational servitude no fair and honorable dealings claim exists. The essence of a fair and honorable dealings claim involves the existence of a special obligation concerning a specified subject—in this case, the United States' navigational servitude—and the absence of such an obligation is fatal to such claim.

Likewise, the United States' promise to hold the Arkansas riverbed "for the use and benefit" of the Chero-

kees, Act of April 26, 1906, § 27, 34 Stat. 148, does not create a special obligation concerning compensation for the exercise of the United States' navigational servitude. The United States certainly cannot give away or appropriate tribal lands or interests held in trust for the Indians, but it cannot be said that the United States is giving away or appropriating *anything* belonging to the plaintiff herein when it exercises its navigational servitude since the exercise of the servitude is "not an invasion of any private property rights in the stream of the lands underlying it . . . ." *United States v. Cherokee Nation of Oklahoma*, 107 S.Ct. at 1492 (quoting *United States v. Rands*, 389 U.S. at 123). *See also United States v. Mitchell*, 445 U.S. 535, 540-546 (1980) (language of the General Allotment Act of 1887 requiring the United States to "hold the land . . . in trust for the sole use and benefit of the" allottee did not create a fiduciary duty on the part of the United States to manage timber resources).

Based on the foregoing reasons, this court finds that plaintiff has failed to show, and in fact cannot show, that the United States has assumed a special obligation to compensate plaintiff for the exercise of its navigational servitude. Accordingly, plaintiff has failed to establish the existence of a fair and honorable dealings claim under Section 2 of the Act.

Therefore, this court finds that plaintiff's motion for summary judgment should be denied and defendant's motion for summary judgment should be granted.

IT IS SO ORDERED this 22 day of December, 1987.

/s/ Frank H. Seay
FRANK H. SEAY
United States District Judge

APPENDIX D

Public Law 97-385

INDIAN CLAIMS

An Act conferring jurisdiction on certain courts of the United States to hear and render judgment in connection with certain claims of the Cherokee Nation of Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946, as amended (the Indian Claims Commission Act, 60 Stat. 1049, 1052; 25 U.S.C. 70k), jurisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Oklahoma, to hear, determine, and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commission Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and powerheads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation; and also on any claim which the Cherokee Nation of Oklahoma may have against the United States resulting from any action under section 14 of the Act of April 26, 1906 (34 Stat. 137, 142), wherein the United States gave away to third parties lands for what are known as station grounds of railroads, said lands being segregated from Cherokee Na-

tion tribal lands without compensation to said Cherokee Nation of Oklahoma therefor; all of said lands or interests therein being held by said Cherokee Nation by virtue of treaties and by patent issued by the United States granting said lands to said Cherokee Nation in fee simple, or otherwise.

(b) Notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act approved August 13, 1946 (25 U.S.C. 70k), the Court of Claims or the United States District Court for the Eastern District of Oklahoma shall have jurisdiction to the same extent as under subsection (a) of this Act to hear, determine, and render judgment on any claim of the Choctaw Nation and on any claim of the Chickasaw Nation against the United States for any damages to any tribal assets, lands, or interests of such Nations arising from the sanctions of the United States described in such subsection.

Approved December 23, 1982.

APPENDIX E

[Chapter 959]

AN ACT

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

APPENDIX F

§ 2509. Congressional reference cases

(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the United States Claims Court pursuant to section 1492 of this title, the chief judge shall designate a judge as hearing officer for the case and a panel of three judges of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding officer of the panel.

* * * *

(c) The hearing officer to whom a congressional reference case is assigned by the chief judge shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

APPENDIX G

CHEROKEE HISTORICAL CHRONOLOGY

Researched and Compiled

by

Rennard Strickland *

The Cherokee Chronology is based upon research conducted in primary documents, manuscripts and official publications recording the historical relationship between the United States and the Cherokee Nation. The public papers consulted include, among others, the records of the War Department, the Bureau of Indian Affairs, the United States Agents to the Cherokee Nation, the Cherokee Nation, the Arkansas Territorial Papers, the Dawes Commission and the Five Civilized Tribes Agency. All documents were personally examined by Rennard Strickland. The collections consulted and archival locations include the National Archives Microfilm Publications of the War Department, the Bureau of Indian Affairs, the Cherokee Agency, the Indian Superintendents, and the Cherokee Agency, West at the Western History Collection, the University of Oklahoma, Norman; the Official Records of the Cherokee Nation, Dawes Commission Manuscripts, Archival Records of the Five Civilized Tribes Agency, the Grant Foreman Collection, Indian and Pioneer Collection Transcripts at the Oklahoma Historical Society, Oklahoma City; and the Cherokee Nation Files, the John Drew Merchant Papers, the William Whitfield Ledger and Ac-

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count Books, and the Grant-Foreman Collection of U.S. Military Records at the Thomas Gilcrease Institute of American History and Art, Tulsa.

1500-1785 The Cherokees are the aboriginal holders of more than seventy million (70,000,000) acres of land, controlling hunting and fishing domain including rivers and streams in the present states of Tennesee, Georgia, Alabama, Kentucky, North and South Carolina, and Virginia.

1540- When the first European party of the deSota expedition comes into the "Province of Chelaque," the tribesmen are settled along streams and regularly using the waterways for trade and navigation.

1673- Cherokees bargain with itinerant traders from English settlements for the use of rivers as trade routes through their country.

1717- Cherokees and British Indian Commissioners establish regulation of trade including shipment of goods on Cherokee waterways.

1777- Dragging Canoe and over a thousand followers known as the Chickamauga Cherokees exert control over commerce on the Tennessee.

1785- Treaty of Hopewell is the first agreement negotiated between the United States and the Cherokees. Known as a treaty of "peace and friendship," the boundary lines between the Cherokees and the United States are drawn and the Cherokees in Article III acknowledge themselves "to be under the protection of the United States . . . and of no other sovereign whosoever" and the United States agrees in Article IV "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions . . . the United States . . . shall

have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."

1791- Treaty of Holston is another "treaty of peace and friendship" in which the United States "solemnly guarantee to the Cherokee Nation, all their lands not hereby ceded." In exchange for this promise the Cherokee Nation acknowledged themselves "to be under the protection of the said United States of America, and of no other sovereign whatsoever." The Cherokees agreed "that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the navigation of the Tennessee river."

1794- Cherokees by treaty make further land cessions; the United States continues to affirm its protection of the Cherokee.

1798- Additional Cherokee treaty land cessions of October 2, 1798 renewed affirmation by the United States of a solemn guarantee of protection of the Cherokee Nation.

1804- Tribe cedes land in Georgia.

1805- The Cherokees agree to reduce their tribal domain and the United States repeats the obligation to protect the Indian Nation in treaties of October 25 and 27, 1805.

1806- Treaty of January 7, 1806 relinquishes tracts in Tennessee and Alabama.

1807- An addendum to Treaty of 1806, completed on September 11, 1807 negotiated for the Cherokee Nation to have "ceded to the United States all the rights, title and interest which

the said Cherokee Nation ever had to a tract of country . . . includ[ing] all waters of the Elk River."

1813- The Cherokees grant, by Agreement of March 8, 1813, permission for agents to establish a public road between the Tennessee and Tugola Rivers with compensation to the tribe providing: "said company are to have the benefit of one ferry on Tennessee River, and such other ferry or ferries as are necessary on said road; and, likewise, said company shall have the exclusive privilege of trading on said road during the aforesaid term of time."

1813- The Agent to the Cherokees witnessed the grant of authority by the Cherokee Nation for the construction of a turnpike in Cherokee territory, including "one ferry on Tennessee River, and such other ferry or ferries as are necessary on said road . . . ." There is no negotiation for a reservation of navigation rights on the rivers secured to the Cherokee Nation in the treaties of removal to the Indian Territory.

1816- Additional land ceded in Treaties of March 22 and September 14, 1816. Relationship reaffirmed.

1817- United States negotiates with the Cherokees to inaugurate the first U.S. mail service through the Cherokee Nation using the waterways and establishing the first post office at Ross' Landing on the river near Chattanooga, Tennessee.

1817- In the Treaty of July 8, under the first of a series of removal treaties, the Cherokees exchanged land in Georgia for equal acreage in Arkansas Territory with the United States

reserving "the right of establishing factories, a military post, and roads" but also providing that "nothing in the foregoing articles shall be construed so as to prevent any of the parties from the free navigation of all the waters mentioned therein."

1819- By the Treaty of February 27, 1819 the "Old Settler" Cherokees remove to the Arkansas Territory under treaty provisions and land exchange agreements.

1819- Cherokee National Resolution passed on October 26, 1819 granting tribal permits to charge fees and regulate the activities of "ferryman and turnpike keepers." Resolution passed on October 28, 1819 confirming tribal governments power to limit license to trade includes both rivers and turnpikes. National Committee hears and resolves case over turnpikes, ferries and trade.

1820- Resolution of October 25, 1820 restricts nature and use of permits to Cherokee property.

1821- National Council passes resolution on use of non-Indian ferrymen by Cherokees. Authorization of regulations and rates for a group of Cherokees operating toll roads across the Nation including several at ferries. A similar resolution is passed on November 2, 1822.

1822- Cherokee Councils enumerated duties for keepers of turnpikes and ferries within the Cherokee Nation.

1824- United States Agent refers question of claim to ferry landing on the south bank of the Highwassay [sic] River to the Cherokee tribe for resolution under tribal authority and jurisdiction.

1824- The Cherokees pass resolution on October 25, 1824 providing for the sale of shares to open and repair certain ferries in the Cherokee Nation.

1825- The United States Agency receives report on occupancy of ferry and improvements on Chattachoochie [sic] on behalf of the Cherokee Nation.

1825- U.S. Agent Colonel Hugh Montgomery acting for the President requests permission of the Cherokee Nation to make "a survey for the purpose of ascertaining the practicability of a canal thro' their Nation."

1826- The Cherokee General Council rejects the canal proposal saying that they shall not "be permitted to make internal improvements within the sovereign limits of the Cherokee Nation" or be permitted "to cut a canal thro' the Nation without first securing the right of soil and jurisdiction over the ground where the canal would pass, and which right the Cherokee Nation can never surrender."

1826- United States refers claims for seizure of goods, including intoxicating spirits, on the Conesuaga River in the Cherokee Nation to Charles Hicks, Head of the National Committee and Council of the Cherokee Nation.

1826- Cherokee Nation to the United States communicates "certain grievances which they desire may be redressed" including intruders use of rivers and ferries causing damage.

1826- Cherokee Council defines and orders removal of intruders defined as all persons without lawful permits including ferrymen.

1827- Council in resolution of October 20, 1827 rejects compromise proposal of turnpike company.

1828- The Western or "Old Settler" Cherokees agree to exchange their lands in Arkansas, by Treaty of May 6, 1828, for lands in Indian Territory (Oklahoma) with the United States swearing "to guarantee it to them forever, and that guarantee is solemnly pledged." This was, according to the preamble of the treaty to be a "permanent home"—"a home that shall never, in all future time, be embarrassed by having extended around it the lines, or place over it the jurisdiction of a Territory or State."

1828- United States Agent to Cherokees refers complaint to Cherokee court for seizure of goods on the river by Lighthorse (tribal police) for resolution under the laws of the Cherokee Nation not the United States.

1828- The Cherokees and the United States by the Treaty of 1828 enter an agreement reserving a military post on Cherokee lands at Fort Gibson, on the Grand River, with the right to run a road through Cherokee lands to reach the Fort.

1828- Resolution passed on November 4, 1828, making it unlawful "to exact toll or ferriage within the limits of the Cherokee Nation from Citizens of the Nation." Resolution of November 4, 1828 establishing rates of ferriage at Ferry on Tennessee River. Resolution of November 11, 1928 declares it unlawful for citizens to open public roads or ferries without permission of general council with provisions for closing illegal roads and ferries with tri-

bal penalties. Resolution of November 13, 1828 authorizing the Nation to lease ferry and make improvement on the federal road. Resolution of November 14, 1828 authorizes Cherokee circuit courts to regulate "the rates of tolls, and ferriages at all turnpikes, toll bridges and ferries" within the limits of the Cherokee Nation.

1829- Cherokees seize "spirits" being transported by non-Indians on the Cherokee waterways of the Coosa River near Turkey Town in violation of tribal laws.

1830- The United States Congress passes the Indian Removal Act of May 28, 1830 providing for the exchange of lands for those west of the Mississippi and guaranteeing that "the United States will cause a patent or grant to be made and executed" which would "forever secure and guarantee to them and their heirs, or successors, the country exchanged with them" and to "be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians or from any other person or persons whatever."

1830- Murder on Cherokee ferry bank is heard in Circuit Court of the Cherokee Nation, Hightower District.

1831- Cherokee National Committee and Council adopt resolutions continuing tribal authority and regulation in the face of a series of acts by the Georgia legislature attempting to abolish tribal authority and attempting to extend Georgia's sovereignty over the Cherokee Nation.

1831-1832 United States Supreme Court decisions in *Cherokee Nation v. Georgia* and *Worcester v.*

Georgia acknowledge and sustain the trust relationship between the United States and the Cherokee Nation.

1832- United States agents continue to recognize the rights of the Cherokee Nation to issue permits and charge fees for ferries and river tolls.

1833- In the Treaty with the Western Cherokees of February 14, 1833, the United States clarified the boundary between Creek and Cherokee lands in the Indian Territory while again affirming that the United States agreed "to possess the Cherokees, and to guarantee it to them forever and that guarantee is solemnly pledged." A specific reservation was made of "the saline or salt plains" so as "to permit other tribes of red men, to get salt on said plain in common with the Cherokees. . . "

1834-1835 Army Captain John Stuart questions authorization to enforce liquor sales restrictions and advises that military should not board boats in the Arkansas River above Fort Smith because only the Cherokee Nation has jurisdiction and authority to regulate on the waterway while military can supervise intoxicants at points of entry over roadways.

1835- The Treaty of New Echota exchanges Cherokee land East of the Mississippi for new areas in Indian Territory (now Oklahoma) providing that the Cherokee lands would "in no future time without their consent, be included within the territorial limits or jurisdiction of any state or territory" and that the Nation would continue to have the right of self-government in the new land.

1838- President Martin Van Buren issued the official United States patent to the Cherokee Nation granting fee simple title to the Cherokee domain in the Indian Territory encompassing more than fourteen million (14,000,000) acres including a portion of the Arkansas River contained therein. Only three reservations on title were contained therein: 1) Rights of other tribes to salt; 2) Lands assigned to the Quapaws; and 3) The right to establish and maintain military posts and roads together with the free use of land, timber, fuel and materials for the construction and support of those facilities." The United States, by patent to the Cherokee Nation, conveyed the absolute fee simple title to the Arkansas riverbed within the Cherokee domain in accordance with the terms contained in the Cherokee treaties of 1828, 1833, and 1835 preserving the treaty promise of the right of exclusion of non-Indians and the promise never to be included within a Territory or State to "have and hold the same . . . forever."

1838- The Cherokee National Committee and Council enact legislation declaring that the "sovereignty of the Cherokee Nation, together with the constitution, laws, and usage" are to remain in full force during the migration and in the new country."

1838-1839 "Trail of Tears" or enforced migration of fifteen thousand (15,000) Cherokees to lands in the West; more than four thousand (4,000) Cherokees die during the removal. Convention of 1839 reuniting Eastern and Western Cherokees followed by a Constitutional Convention reaffirming treaty relations and ratification of a new Constitution.

1839- Agent William Armstrong, Acting Superintendent, Western Territory, in his Annual Report stresses the importance to the Cherokees of the navigable Arkansas River, noting that "[w]ith the Arkansas River passing through a large portion of [the Cherokee Nation], upon whose waters the surplus productions of the nation can be transported to market, steamboats can ascend, bringing goods, groceries, and such articles as are required for the use and consumption of the people."

1839-1907 Cherokee Nation exclusively and with formal United States' recognition, regulates use of the Arkansas River and other rivers under provisions of the *Laws of the Cherokee Nation*. "Any person desirous of keeping a public ferry, shall first be required to obtain a license from the national treasurer . . . ." with the highest fees set for the Arkansas and Canadian rivers." The Cherokee Nation over the next seventy years taxes commerce on a dollar value of riverborne commercial goods brought into the Nation and leases coal, sand and gravel, oil and other resources in the bed and on shore of the river.

1840- Cherokee Nation reports the issuance of 22 licenses to operate landings on 135 river miles including the Arkansas between Fort Smith and Fort Gibson.

1840-1907 The United States military and Indian agents refer all questions of licensing and navigation to the Cherokee Nation. The United States through its agents acknowledge that power over navigation in the rivers of the Cherokee Nation rested with and was exercised by the Cherokee Nation.

1844- Captain E. Balenger, Quartermaster, United States Army, contracts with Cherokee merchant John Drew to deliver on the Arkansas River corn and oats from Fort Gibson to Fort Smith.

1844-1845 The Cherokee Nation runs ads for steamboat commerce on the Arkansas in the tribal newspaper *The Cherokee Advocate.* The 1845 edition of *The Cherokee Almanac* contains reports and records of river commerce.

1845- United States agents refer claims from sinking of McLain Keelboat and the steamboat Victoria to the courts of the Cherokee Nation.

1849- Cherokee Nation adopts "An Act Relating to Public Ferries" which controls licensing, fees and standards of performance.

1854- Cherokee Agent George Butler recommends "the abandonment of Fort Gibson as a military post" because of the post "occupying a locality that would be of great value to the citizens of the nation, being at the head of the Arkansas and Grand rivers, and in possession of the only eligible point on the river, from which commercial advantages can be derived, while their continuance there now is unnecessary." The Cherokee Nation on October 11, 1854 adopts ordinance that abandoned military and agency property shall become the public property of the Nation. The Cherokees issue Memorial to the United States demanding removal of fort and military because conduct is a curse to the Cherokee Nation as a civilized community.

1857- The military abandons Fort Gibson and the property with the access roads and ferry sites for riverbed commerce and under treaty pro-

visions reverts to the Cherokee Nation. Cherokees enact legislation assuming control over all former military and agency property.

1858-1861 Period of intensified river commerce as recorded by William Whitfield in the ledger and account books documenting consignments on the Arkansas River, 1858-1861.

1861-1865 Cherokee Nation caught in conflict of the American Civil War with interruption of tribal government, normal commerce including regulation of waterways.

1866- The post-Civil War Cherokee Treaty of Fort Smith, July 19, 1866, once again provided in Article 26 that "the United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country" and that the United States would remove all persons not lawfully within the Cherokee Nation.

1871- The Appropriations Act of March 3, 1871 provides for the termination of treaty making with Indian tribes. All treaties enacted before this date are to remain in force.

1874- Chief Bushyhead of the Cherokees is called upon to resolve conflict over ownership and operation of Arkansas River ferry.

1881- Case involving ownership of the ferry license referred to Cherokee Supreme Court for resolution.

1881- National Council enacts special legislation on the use of roads, ferry and bridges on December 8, 1881 exercising Cherokee regulatory authority.

1881- The *Laws of the Cherokees* in compilation at Article XXXIII, Sections 151 and 152 continue regulation and control of ferries.

1884- Opinion issued by Executive Department of the Cherokee Nation on question of handling complaints when "reliable parties, citizens of the Nation, complain of the illegal management of a ferry, and apply such complaints for a revocation of the license to operate." Cherokee citizens complain about the operation of Ross' Ferry on the Arkansas.

1885- Cherokee Senate Bill No. 11 passed by the National Council sets the "rates of ferrage [that] shall be established across the Grand and Arkansas River."

1891- In order to resolve a question over a ferry boat at a point between the Ottawa and Cherokee lands, where the military road from Fort Scott to Fort Gibson crosses the river, the Department of the Interior makes inquiry of the Cherokee Nation as to their laws and regulations for the operation of ferry boats.

1892- The public ferries provisions of the Cherokee laws are codified in Article XXXII, Sections 739 and 740 of the *Compiled Laws of the Cherokee Nation.*

1893- By Act of March 3, 1893, the United States appointed a commission (known as the DAWES COMMISSION) to negotiate with the Five Civilized Tribes (including the Cherokees) "for the purpose of the extinguishment of the national or tribal title to any land."

1893-1898 The Cherokees and the other Five Tribes resist the Dawes Commission efforts to negotiate with them to surrender their rights under their historic treaties and patents.

1896- U.S. Indian Agent D.M. Wisdom notifies Indian police of the complaint of the Cherokee treasurer regarding license violations by intruders.

1898- Congress in the Curtis Act of June 28, 1898 mandates the Cherokees and other Five Civilized Tribes to execute agreements surrendering their lands for allotment of the land and modifying their governments.

1898- Acting Secretary of the Interior, pursuant to the Curtis Act, issues regulations on July 21, 1898 that "all rents and royalties arising upon such contracts, leases, permits, etc. . . . shall hereafter . . . be collected . . . and the proceeds paid into the Treasury of the United States, to the credit of the respective tribes . . . ."

1898-1902 The Cherokee Nation challenges the right of the United States to assume administrative control over its property and affairs until the Supreme Court in *Cherokee Nation v. Hitchcock* concludes that since "there is no question involved in this case as to the taking of property" that Congress had the authority to order the allotment of tribally held land in severalty to tribal members.

1898-1907 The United States Agent for the Five Civilized Tribes collects all fees for Arkansas River including sand and gravel leases and pays to account of the Cherokee Nation. The United States acts as trustee for the Cherokees in collecting and transferring to tribal accounts all revenues from the riverbed including ferry fees, mineral incomes, and lease payments. All licensing and leasing is left in the control of the Cherokee Nation.

1900- United States Agent in letters to potential licensees recognizes that riverbed property continues to belong to the Nation. Earlier Cherokee Supreme Court case holding that ferries in the Nation are not inheritable by the heirs of the deceased licensee but are the property of the Nation is still controlling.

1900- U.S. Indian Agent acknowledges that all fees and ferry tax for rivers that empty into the Arkansas and all income from sand, gravel, coal and oil leases paid into the Department of the Interior are credited to the Cherokee Nation's account and forwarded to Joe M. La Hay, treasurer of the Cherokee Nation. Later the agent concludes that this also includes license renewals.

1901- Annual Message of Cherokee Chief Buffington shows collections to the credit of the Cherokee Nation in the United States Treasury $200.00 in Ferry Taxes for July 1, 1900 to June 30, 1901.

1901- United States Indian Inspector for the Indian Territory writes Chief T.M. Buffington of the Cherokees retaining the 1892 Cherokee enacted regulatory scheme because "the operation of ferries is a public necessity, and that it would not be advisable to change the present law. . . ."

1901- U.S. Agent requests from the Cherokee Nation a formal listing with "issuance and transmittal to this office of licenses" decided upon by the tribe for "certain persons to operate ferries in the Cherokee Nation."

1902- U.S. Agent notes that all changes in the names and designation of licensees must be authorized

and issued by the Cherokee Nation. United States Agent directs a question "whether or not, under the laws of the Cherokee Nation, a citizen of the United States, can be granted a license to operate a ferry," to the Cherokee Nation for resolution.

1902-1906 Under the Act of July 1, 1902, the United States provided for the allotment of the tribal lands to individual members of the Cherokee Nation and the United States assumed full administrative control over all of the affairs and property of the Cherokee Nation to carry out the provisions of the Curtis Act of 1898 and the Allotment Act of 1902.

1904- United States Indian Agent advises that "all necessary blanks to obtain a license" to operate a ferry must come from the Cherokee Nation.

1906- Cherokee Nation continues to regulate and exercise authority over navigation including licensing and taxing of ferry and ferrymen which is assisted by federal Indian agents who direct inquiries to tribal national treasurer.

1906- The riverbed of the Arkansas River is not allotted by the Dawes Commission to individual Indians, and under the patent issued by the United States to the Cherokee Nation in 1838, the fee simple title to the Arkansas riverbed is vested in the Cherokee Nation and held in trust by the United States for the use and benefit of the Cherokee Nation.

1906- The riverbed passes in trust to the United States under the terms of the Five Civilized Tribes Act of 1906 providing for the final disposition of tribal affairs under the following

Congressional enactment: "That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, upon the dissolution of said tribe, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians . . . ."

1907-Present — Under the statutory provisions of the 1906 Five Civilized Tribes Act, the United States continues as the trustee for the lands not allotted which are "to be held in trust by the United States for the use and benefit of the Indians."

APPENDIX H

Be it enacted by the National Council, That any person desirous of keeping a public ferry, shall-first be required to obtain a license for that purpose from the National Treasurer, and for which he shall pay, annually in advance, the following tax, to wit: For a ferry on the Arkansas, Canadian, or Grand Rivers, the sum of twenty-five dollars per annum. In the Illinois and Verdigris rivers, the sum of five dollars per annum. Any person, so obtaining a license, shall be required to keep good boats and ferrymen, and cross all persons, promptly during seasonable hours, (Sundays excepted) when it can be done with safety, at rates heretofore fixed by law. No person shall be allowed to open a new ferry within less than half mile of any ferry established agreeably to the provisions of this Act.

Be it further enacted, That any person, found guilty of a violation of the provisions of this act, shall be subject to a fine for every such offence, in a sum double the amount of the license established above. One half for the benefit of the informer, and the other for the Treasury. All such fines shall be recoverable before the Courts of the Nation.

Tahlequah, October 31st 1849.

James Kell, Pres't Committee.

Concurred with the following amendment: Insert, ten dollars per annum, in the place of five dollars, on the Illinois and Verdigris rivers.

Six Killer, *Speaker Council*

Approved-JNO. Ross.

Laws of the Cherokee Nation: Adopted by the Council at Various Periods (Cherokee Advocate Office 1852, Tahlequah, Cherokee Nation), *reprinted in* Scholarly Resources,

Inc., *The Constitution and Laws of American Indian Tribes* Volume V 194-95 (1973). *See also laws of the Cherokee Nation (1892)*, Chapter XII, Article XXXII Relating to Public Ferries, Sections 739 and 740, *reprinted in* Scholarly Resources, Inc., *The Constitutions and Laws of the American Indian Tribes* Volume X 365 (1973).

APPENDIX I

TREATY WITH THE CHEROKEE, 1791.

A Treaty of Peace and Friendship made and concluded between the President of the United States of America, on the Part and Behalf of the said States, and the undersigned Chiefs and Warriors of the Cherokee Nation of Indians, on the Part and Behalf of the said Nation.

The parties being desirous of establishing permanent peace and friendship between the United States and the said Cherokee Nation, and the citizens and members thereof, and to remove the causes of war, by ascertaining their limits and making other necessary, just and friendly arrangements: The President of the United States, by William Blount, Governor of the territory of the United States of America, south of the river Ohio, and Superintendent of Indian affairs for the southern district, who is vested with full powers for these purposes, by and with the advice and consent of the Senate of the United States: And the Cherokee Nation, by the undersigned Chiefs and Warriors representing the said nation, have agreed to the following articles, namely:

* * * *

ARTICLE V.

It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Metro district, and of the navigation of the Tennessee river.

* * * *

ARTICLE XVI.

This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall have been ratified by the President of the United States, with the advice and consent of the Senate of the United States.

In witness of all and every thing herein determined between the United States of America and the whole Cherokee nation, the parties have hereunto set their hands and seals, at the treaty ground on the bank of the Holston, near the mouth of the French Broad, within the United States, this second day of July, in the year of our Lord one thousand seven hundred and ninety-one.

William Blount, governor in and over the territory of the United States of America south of the river Ohio, and superintendent of Indian Affairs for the southern district, [L. S.]
Chuleoah, or the Boots, his x mark, [L. S.]
Squollecuttah, or Hanging Maw, his x mark, [L. S.]
Occunna, or the Badger, his x mark, [L. S.]
Enoleh, or Black Fox, his x mark, [L. S.]
Nontuaka, or the Northward, his x mark, [L. S.]
Tekakiska, his x mark, [L. S.]
Chutlob, or King Fisher, his x mark, [L. S.]
Tuckaseh, or Terrapin, his x mark, [L. S.]
Kateh, his x mark, [L. S.]
Kunnochatutloh, or the Crane, his x mark, [L. S.]
Cauquillehanah, or the Thigh, his x mark, [L. S.]
Chesquotteleneh, or Yellow Bird, his x mark, [L. S.]
Chickasawtehe, or Chickasaw Killer, his x mark, [L. S.]
Tuskegatehe, Tuskega Killer, his x mark, [L. S.]
Kulsatehe, his x mark, [L. S.]
Tinkshalene, his x mark, [L. S.]
Sawutteh, or Slave Catcher, his x mark, [L. S.]
Aukuah, his x mark, [L. S.]
Oosenaleh, his x mark, [L. S.]
Kenotetah, or Rising Fawn, his x mark, [L. S.]
Kanetetoka, or Standing Turkey, his x mark, [L. S.]
Yonewatleh, or Bear at Home, his x mark, [L. S.]
Long Will, his x mark, [L. S.]
Kunoskeskie, or John Watts, his x mark, [L. S.]
Nenetooyah, or Bloody Fellow, his x mark, [L. S.]
Chuquilatague, or Double Head, his x mark, [L. S.]
Koolaquah, or Big Acorn, his x mark, [L. S.]
Toowayelloh, or Bold Hunter, his x mark, [L. S.]
Jahleoonoyehka, or Middle Striker, his x mark, [L. S.]
Kinnesah, or Cabin, his x mark, [L. S.]
Tullotehe, or Two Killer, his x mark, [L. S.]
Kaalouske, or Stopt Still, his x mark, [L. S.]
Kulsatche, his x mark, [L. S.]
Auquotague, the Little Turkey's Son, his x mark, [L. S.]
Talohteske, or Upsetter, his x mark, [L. S.]
Cheakoneske, or Otter Lifter, his x mark, [L. S.]
Keshukaune, or She Reigns, his x mark, [L. S.]
Toonaunailoh, his x mark, [L. S.]

Teesteke, or Common Disturber, his x mark, [L. S.]
Robin McClemore, [L. S.]
Skyuka, [L. S.]
John Thompson, Interpreter.
James Cery, Interpreter.

Done in presence of—

Dan'l Smith, Secretary Territory United States south of the river Ohio.
Thomas Kennedy, of Kentucky.
Jas. Robertson, of Mero District.
Claiborne Watkins, of Virginia.
Jno. McWhitney, of Georgia.
Fauche, of Georgia.
Titus Ogden, North Carolina.
Jno. Chisolm, Washington District.
Robert King.
Thomas Gegg.

APPENDIX J

TREATY WITH THE CHEROKEE, 1806.

A convention between the United States and the Cherokee nation of Indians, concluded at the city of Washington, on the seventh day of January, in the year one thousand eight hundred and six.

ARTICLES of a Convention made between Henry Dearborn, secretary of war, being specially authorized thereto by the President of the United States, and the undersigned chiefs and head men of the Cherokee nation of Indians, duly authorized and empowered by said nation.

* * * *

In the presence of—
Return J. Meigs,
Benjamin Hawkins,
Daniel Smith,
John Smith,
Andrew McClary,
John McClarey.

I certify the foregoing convention has been faithfully interpreted.

Charles Hicks, Interpreter.

Elucidation of a convention with the Cherokee Nation.

WHEREAS, by the first article of a convention between the United States and the Cherokee nation, entered into at the city of Washington, on the seventh day of January one thousand eight hundred and six, it was intended on the part of the Cherokee nation, and so understood by the Secretary of War, the commissioner on the part of the United States, to cede to the United States all the right, title and interest which the said Cherokee nation ever had to a tract of country contained between the Tennessee river and the Tennessee ridge (so called); which tract of country had since the year one thousand seven hundred and ninety four, been claimed by the Cherokees and Chickasaws: the eastern boundary whereof is limited by a line so to be run from the upper part of the Chickasaw Old Fields, as to include all of the waters of Elk river, any thing expressed in said convention to the contrary notwithstanding. It is therefore now declared by James Robertson and Return J. Meigs, acting under the authority of the executive of the United States, and by a delegation of Cherokee chiefs, of whom Eunolee or Black Fox, the king or head chief of said Cherokee nation, acting on the part of, and in behalf of said nation, is one, that the eastern limits of said ceded tract shall be bounded by a line so to be run from the upper end of the Chicka-

saw Old Fields, a little above the upper point of an island, called Chickasaw Island, as will most directly intersect the first waters of Elk river, thence carried to the Great Cumberland mountain, in which the waters of Elk river have their source, then along the margin of said mountain until it shall intersect lands heretofore ceded to the United States, at the said Tennessee ridge. And in consideration of the readiness shown by the Cherokees to explain, and to place the limits of the land ceded by the said convention out of all doubt; and in consideration of their expenses in attending council, the executive of the United States will direct that the Cherokee nation shall receive the sum of two thousand dollars, to be paid to them by their agent, at such time as the said executive shall direct, and that the Cherokee hunters, as hath been the custom in such cases, may hunt on said ceded tract, until by the fullness of settlers it shall become improper. And it is hereby declared by the parties, that this explanation ought to be considered as a just elucidation of the cession made by the first article of said convention.

Done at the point of departure of the line at the upper end of the island opposite to the upper part of the said Chickasaw Oil Fields, the eleventh day of September, in the year one thousand eight hundred and seven.

James Robertson,
Return J. Meigs,
Eunolee, or Black Fox, his x mark,
Fauquitee, or Glass, his x mark,
Fulaquokoko, or Turtle at home, his x mark,
Richard Brown, his x mark,
Sowolotoh, king's brother, his x mark.

Witnesses present:

Thomas Freeman.
Thomas Orme.

APPENDIX K

TREATY WITH THE CHEROKEE, 1816.

Articles of a convention made and entered into between George Graham, specially authorized thereto by the President of the United States, and the undersigned Chiefs and Headmen of the Cherokee Nation, duly authorized and empowered by the said Nation.

* * * *

ART. 2. It is expressly agreed on the part of the Cherokee nation that the United States shall have the right to lay off, open, and have the free use of, such road or roads, through any part of the Cherokee nation, lying north of the boundary line now established, as may be deemed necessary for the free intercourse between the States of Tennessee and Georgia and the Mississippi Territory. And the citizens of the United States shall freely navigate and use as a highway, all the rivers and waters within the Cherokee nation. The Cherokee nation further agree to establish and keep up, on the roads to be opened under the sanction of this article, such ferries and public houses as may be necessary for the accommodation of the citizens of the United States.

* * * *

In testimony whereof, the said commissioner and the undersigned chiefs and head men of the Cherokee nation, have hereunto set their hands and seals. Done at the city of Washington, this twenty-second day of March, one thousand eight hundred and sixteen.

George Graham,	[L. S.]
Colonel John Lowry, his x mark,	[L. S.]
Major John Walker, his x mark,	[L. S.]
Major Ridge, his x mark,	[L. S.]
Richard Taylor,	[L. S.]
John Ross,	[L. S.]
Cheucunsene, his x mark,	[L. S.]

Witnesses present at signing and sealing:
Return J. Meigs,
Jacob Laub,
Gid. Davis.

APPENDIX L

TREATY WITH THE CHEROKEE, 1817.

Articles of a treaty concluded, at the Cherokee Agency, within the Cherokee nation, between major general Andrew Jackson, Joseph M'Minn, governor of the state of Tennessee, and general David Meriwether, commissioners plenipotentiary of the United States of America, of the one part, and the chiefs, head men, and warriors, of the Cherokee nation, east of the Mississippi river, and the chiefs, head men, and warriors, of the Cherokees on the Arkansas river, and their deputies, John D. Chisholm and James Rogers, duly authorized by the chiefs of the Cherokees on the Arkansas river, in open council, by written power of attorney, duly signed and executed, in presence of Joseph Sevier and William Ware.

WHEREAS in the autumn of the year one thousand eight hundred and eight, a deputation from the Upper and Lower Cherokee towns, duly authorized by their nation, went on to the city of Washington, the first named to declare to the President of the United States their anxious desire to engage in the pursuits of agriculture and civilized life, in the country they then occupied, and to make known to the President of the United States the impracticability of inducing the nation at large to do this, and to request the establishment of a division line between the upper and lower towns, so as to include all the waters of the Hiwassee river to the upper town, that, by thus contracting their society within narrow limits, they proposed to begin the establishment of fixed laws and a regular government: The deputies from the lower towns to make known their desire to continue the hunter life, and also the scarcity of game where they then lived, and, under those circumstances, their wish to remove across the Mississippi river, on some vacant lands of the United States. And whereas the President of the United States, after ma-

turely considering the petitions of both parties, on the ninth day of January, A.D. one thousand eight hundred and nine, including other subjects, answered those petitions as follows: "The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove, are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers. The regular districts of the government of St. Louis are already laid off to the St. Francis.

"When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right. Every aid towards their removal, and what will be necessary for them there, will then be freely administered to them; and when established in their new settlements, we shall still consider them as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand."

And whereas the Cherokees, relying on the promises of the President of the United States, as above recited, did explore the country on the west side of the Mississippi, and made choice of the country on the Arkansas and White rivers, and settled themselves down upon United States' lands, to which no other tribe of Indians have any just claim, and have duly notified the President of the United States thereof, and of their anxious desire for the full and complete ratification of his promise, and, to that end, as notified by the President of the United

States, have sent on their agents, with full powers to execute a treaty, relinquishing to the United States all the right, title, and interest, to all lands of right to them belonging, as part of the Cherokee nation, which they have left, and which they are about to leave, proportioned to their numbers, including, with those now on the Arkansas, those who are about to remove thither, and to a portion of which they have an equal right agreeably to their numbers.

Now, know ye, that the contracting parties, to carry into full effect the before recited promises with good faith, and to promote a continuation of friendship with their brothers on the Arkansas river, and for that purpose to make an equal distribution of the annuities secured to be paid by the United States to the whole Cherokee nation, have agreed and concluded on the following articles, viz:

* * * *

ART. 9. It is also provided by the contracting parties, that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein.

* * * *

In witness of all and every thing herein determined, by and between the before recited contracting parties, we have, in full and open council, at the Cherokee Agency, this eighth day of July, A. D. one thousand eight hundred and seventeen, set our hands and seals.

Andrew Jackson, [L. S.]
Joseph McMinn, [L. S.]
D. Meriwether, [L. S.]
United States Commis'rs.
Richard Brown, his x mark, [L. S.]
Cabbin Smith, his x mark, [L. S.]
Sleeping Rabbit, his x mark, [L. S.]
George Saunders, his x mark, [L. S.]
Roman Nose, his x mark, [L. S.]
Currohe Dick, his x mark, [L. S.]
John Walker, his x mark, [L. S.]
George Lowry, [L. S.]
Richard Taylor, [L. S.]
Walter Adair, [L. S.]
James Brown, [L. S.]

Kelachule, his x mark, [L. S.]
Sour Mush, his x mark, [L. S.]
Chulioa, his x mark, [L. S.]
Chickasautchee, his x mark, [L. S.]
The Bark of Chota, his x mark, [L. S.]
The Bark of Hightower, his x mark, [L. S.]
Big Half Breed, his x mark, [L. S.]
Going Snake, his x mark, [L. S.]
Leyestisky, his x mark, [L. S.]
Ch. Hicks, [L. S.]
Young Davis, his x mark, [L. S.]
Souanooka, his x mark, [L. S.]
The Locust, his x mark, [L. S.]
Beaver Carrier, his x mark, [L. S.]
Dreadful Water, his x mark, [L. S.]
Chyula, his x mark, [L. S.]
Ja. Martin, [L. S.]
John McIntosh, his x mark, [L. S.]
Katchee of Cowee, his x mark, [L. S.]
White Man Killer, his x mark, [L. S.]

Arkansas chiefs:

Toochalar, his x mark, [L. S.]
The Glass, his x mark, [L. S.]
Wassosee, his x mark, [L. S.]
John Jolly, his x mark, [L. S.]
The Gourd, his x mark, [L. S.]
Spring Frog, his x mark, [L. S.]
John D. Chisholm, [L. S.]
James Rogers, [L. S.]
Wawhatchy, his x mark, [L. S.]
Attalona, his x mark, [L. S.]
Kulsuttchee, his x mark, [L. S.]
Tuskekeetchee, his x mark, [L. S.]
Chillawgatchee, his x mark, [L. S.]
John Smith, his x mark, [L. S.]
Toosawallata, his x mark, [L. S.]

In presence of—

J.M. Glassel, secretary to the commission,
Thomas Wilson, clerk to the commissioners,
Walter Adair,
John Speirs, interpreter, his x mark,
A. McCoy, interpreter.
James C. Bronaugh, hospital surgeon, U. S. Army,
Isham Randolph, captain First Redoubtables,
Wm. Meriwether,
Return J. Meigs, agent Cherokee Nation.

APPENDIX M

(COPY.) *Cherokee Agency, Highwassee Garrison.*

We, the undersigned Chiefs and Councillors of the Cherokees in full council assembled, do hereby give, grant, and make over unto Nicholas Byers and David Russell, who are agents in behalf of the states of Tennessee and Georgia, full power and authority to establish a Turnpike Company, to be composed of them, the said Nicholas and David, Arthur Henly, John Lowry, Atto, and one other person, by them to be hereafter named, in behalf of the state of Georgia; and the above named persons are authorized to nominate five proper and fit persons, natives of the Cherokees, who, together with the white men aforesaid, are to constitute the company; which said company, when thus established, are hereby fully authorized by us, to lay out and open a road from the most suitable point on the Tennessee River, to be directed the nearest and best way to the highest point of navigation on the Tugolo River; which said road, when opened and established, shall continue and remain a free and public highway, unmolested by us, to the interest and benefit of the said company, and their successors, for the full term of twenty years to come, after the same may be open and complete; after which time, said road, with all its advantages, shall be surrendered up, and reverted in, the said Cherokee nation. And the said company shall have leave, and are hereby authorized, to erect their public stands, or houses of entertainment, on said road, that is to say: one at each end, and one in the middle, or as nearly so as a good situation will permit: with leave also to cultivate one hundred acres of land at each end of the road, and fifty acres in the middle stand, with a privilege of a sufficiency of timber for the use and consumption of said stands. And the said Turnpike Company do hereby agree to pay the sum of one hundred and sixty dollars yearly to the Cherokee nation, for the aforesaid privilege, to commence after said road is opened and in complete operation. The

said company are to have the benefit of one ferry on Tennessee river, and such ferry or ferries as are necessary on said road; and, likewise, said company shall have the exclusive privilege of trading on said road during the aforesaid term of time.

In testimony of our full consent to all and singular the above named privileges and advantages, we have hereunto set our hands and affixed our seals, this eighth day of March, eighteen hundred and thirteen.

Outahelce, his x mark,	[L. S.]	Ooseekee, his — mark,	[L. S.]
Naire, above, his x mark,	[L. S.]	Toochalee,	[L. S.]
Theelagathahee, his x mark,	[L. S.]	Chulio,	[L. S.]
The Raven, his x mark,	[L. S.]	Dick Justice,	[L. S.]
Two Killers, his x mark,	[L. S.]	Wausaway,	[L. S.]
Teeistiskee, his x mark,	[L. S.]	Big Cabbin,	[L. S.]
John Boggs, his — mark,	[L. S.]	The Bark,	[L. S.]
Quotiquaskee, his — mark,	[L. S.]	Nettle Carrier,	[L. S.]
Currihee, Dick, his — mark,	[L. S.]	Seekeekee,	[L. S.]
		John Walker,	[L. S.]
		Dick Brown,	[L. S.]
		Charles Hick,	[L. S.]

Witnesses present:
Wm. L. Lovely, assistant agent,
William Smith,
George Colville,
James Carey,
Richard Taylor,
Interpreters.

The foregoing agreement and grant was amicably negotiated and concluded in my presence.

Return J. Meigs.

I certify I believe the within to be a correct copy of the original.

Charles Hicks.

WASHINGTON CITY, *March 1, 1819.*

APPENDIX N

TREATY WITH THE WESTERN CHEROKEE, 1828.

May 6, 1828, 7 Stat. 311, 2 Kapp. 288

Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connextions in future; and, Whereas, it being important, not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may

attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:

* * * *

ART. 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: [descriptions omitted]

* * * In addition * * * the United States further guarantee to the Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extended.

ART. 3. The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any other sort, shall exist to annoy the Cherokees—and also to keep all such from the West of said line in future.

* * * *

ART. 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their Brothers yet remaining in the States may

be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given on enrolling himself for emigration, a good Rifle, a Blanket, and Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. * * *

ART. 9. It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neasho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two mile distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

* * * *

Done at the place, and on the day and year above written.

James Barbour, [L. S.]
Black Fox, his x mark [L. S.]
Thomas Graves, his x mark, [L. S.]
George Guess,* [L. S.]

---

* Written by the signers in their language, and in the characters now in use among them, as discovered by George Guess.

Thomas Maw,[a] [L. S.]
George Marvis,[a] [L. S.]
John Looney,[a] [L. S.]
John Rogers, [L. S.]
J. W. Flawey, counselor of Del. [L. S.]
Chief of the delegation.

Witnesses:

Thos. L. McKenney,
James Rogers, interpreter,
D. Kurtz,
H. Miller,
Thomas Murray,
D. Brown, Secretary Cherokee delegation,
Pierye Pierya,
E. W. Duval, United States agent, etc.

Ratified with the following proviso:

"Provided, nevertheless, that the said convention shall not be so construed as to extend the northern boundary of the 'perpetual outlet west,' provided for and guaranteed in the second article of said convention, north of the thirty-six degree of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek tribe of Indians; and provided further, That nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes."

DEPARTMENT OF WAR,
31st May, 1828.

To the Hon. HENRY CLAY,
Secretary of State:

SIR: I have the honor to transmit, herewith, the acceptance of the terms, by the Cherokees, upon which the recent convention with them was ratified. You will have the goodness to cause the same to be attached to the treaty, and published with it.

I have the honor to be, very respectfully, your obedient servant,

SAM'L L. SOUTHARD.

COUNCIL ROOM, WILLIAMSON'S HOTEL,
Washington, May 31st, 1828.

To the SECRETARY OF WAR,
Washington City:

SIR: The undersigned, chiefs of the Cherokee nation, west of the Mississippi, for and in behalf of said nation, hereby agree to, and accept of, the terms upon which the Senate of the United States ratified the convention, concluded at Washington on the sixth day of May, 1828, between the United States and said nation.

In testimony whereof, they hereunto subscribe their names and affix their seals.

Thomas Graves, his x mark	[L. S.]
George Maw, his x mark,	[L. S.]
George Guess, his x mark.	[L. S.]
Thomas Marvis, his x mark,	[L. S.]
John Rogers.	[L. S.]

Signed and sealed in the presence of—
E. W. Duval, United States agent, etc.
Thomas Murray,
James Rogers, interpreter.

APPENDIX O

TREATY WITH THE WESTERN CHEROKEE, 1833.

February 14, 1833, 7 Stat. 414, 2 Kapp. 385

WHEREAS articles of convention were concluded at the city of Washington, on the sixth day of May one thousand eight hundred and twenty-eight, between James Barbour Secretary of War, being specially authorized therefor by the President of the United States, and the chiefs and head men of the Cherokee nation of Indians west of the Mississippi, which articles of convention were duly ratified. And whereas it was agreed by the second article of said convention as follows "That the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, said land to be bounded as follows; [description omitted] * ** The United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west, as the sovereignty of the United States and their right of soil extend. * * *

ARTICLE I. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: [description omitted] * * *. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend—Provided however, that if the saline, or salt plain, on the

great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees—and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

* * * *

In testimony whereof, the said Montfort Stokes, Henry L. Ellsworth, and John F. Schermerhorn, commissioners as aforesaid, and the chiefs and head men of the Cherokee nation aforesaid, have hereunto set their hands, at Fort Gibson on the Arkansas river, on the 14th day of February, one thousand eight hundred and thirty-three.

Montfort Stokes,
Henry L. Ellsworth,
J. F. Schermerhorn,
John Jolly, his x mark,
Black Coat, his x mark,
Walter Weller,
Principal chiefs:
John Rogers, president commissioners,
Glass, president council.

Signed, sealed, and delivered in our presence:

S. C. Stambaugh, secretary commissioners,
M. Arbuckle, colonel Seventh Infantry,
Geo. Vashon, agent Cherokee west,
Jno. Campbell, agent Creeks.
Alexander Brown, his x mark,
Jno. Hambly,
Interpreters,
Wilson Nesbitt,
Peter A. Carns,
N. Young, major U. S. Army,
W. Seawell, lieutenant Seventh Infantry,
Wm. Thornton, clerk committee,
Charles Webber, clerk council.

APPENDIX P

TREATY WITH THE CHEROKEE, 1835.

December 29, 1835, 7 Stat. 478, 2 Kapp. 439

WHEREAS the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Governments may be terminated and adjusted; and with a view of reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

* * * *

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river.
* * *

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "[description omitted]. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven

millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied."

ARTICLE 3. The United States also agree that the lands above ceded by the treaty of Feb. 14 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging

to their people of such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers mechanics and teachers for the instruction of Indians according to treaty stipulations.

* * * *

In testimony whereof, John F. Schermerhorn, commissioner on the part of the United States, and the undersigned delegation have hereunto set their hands and seals, this first day of March, in the year one thousand eight hundred and thirty-six.

J. F. Schermerhorn.

Major Ridge, his x mark, [L. S.]
James Foster, his x mark, [L. S.]
Tah-ye-ske, his x mark, [L. S.]
Long Shell Turtle, his x mark, [L. S.]
John Fields, his x mark, [L. S.]
James Fields, his x mark, [L. S.]
George Welch, his x mark, [L. S.]
Andrew Ross, [L. S.]
William Rogers, [L. S.]
John Gunter, [L. S.]

John A. Bell,	[L. S.]	James Starr, his x mark,	[L. S.]
Jos. A. Foreman,		Stand Watie,	[L. S.]
Robert Sanders,	[L. S.]	John Ridge,	[L. S.]
Elias Bondinot,	[L. S.]	James Rogers,	[L. S.]
Johnson Rogers,	[L. S.]	John Smith, his x mark,	[L. S.]

Witnesses:

Elbert Herring,	John Robb,
Thos. Glascock,	Wm. Y. Hansell,
Alexander H. Everett,	Saml. J. Potts,
Jno. Garland, Major, U. S. Army,	Jno. Litle,
C. A. Harris,	S. Rockwell.

APPENDIX Q

Excerpts—Cherokee Patent, 1838

THE UNITED STATES OF AMERICA
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians** it was stipulated and agreed on the part of the United States,** the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are** in the words following, that is to say:—

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three,** the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians,** SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits** the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS,** hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with the said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land;**

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty.**

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall be made."—

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square** on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river;** thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas,** thence south fifty three degrees west, one mile, to a post** thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock** thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river,*** thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the southwest corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high** thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-

eight chains, to a post on the east bank of Neosho river;** thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square** thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square** thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.—

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof**

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of lands so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second

article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.—

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

M. VAN BUREN

By the President
M.M. GARLAND
Recorder of the General Land Office

APPENDIX R

Sallisaw, Ind. Ter. 1-16 1900

Mr. Joe M. LaHay

Sir; I have bin (sic) refered (sic) to you to secure a License for running a ferry on the Arkansas River. Please let me know what it will cost me and oblige.

Your Resp.

/s/ W. M. Rogers,
Sallisaw, I.T.

APPENDIX S

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE.

Union Agency.

Muscogee, Indian Territory, December 13th, 1899.

Joe M. LaHay,
Treasurer Cherokee Nation,
Tahlequah, I. T.,

Sir:

Mrs. Nannie E. Foreman has paid me $25.00, and I respectfully recommend that you renew her license to operate a ferry on the Arkansas River at a place known as "Foreman's Ferry", for one year from December 17th, 1899, that date being the expiration of her present license.

Very respectfully,

/s/ J. Blair Shornfelt
U.S. Indian Agent.

Approved:
J. Geo. Wright
U. S. Indian Inspector.

APPENDIX T

Treasury Department
Jan. 1st 1877

Know all men by these presents that I D. W. Bushyhead Treasurer of the Cherokee Nation by virtue of authority vested in me by law, do grant and by these presents confirm unto Gilbert Bowling a license to keep a Public Ferry on Crand River at what is known as Ketchers Ferry for the term of six months from date hereof— Said Gilbert Bowling having complied with the act relating to Public Ferries.

/s/ D. W. Bushyhead
Treasurer

APPENDIX U

CHAP. 2348.—An act to amend section six of an act approved February eight, eighteen hundred and eight-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

* * * *

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other act of Congress.

FILED
APR 27 1992
OFFICE OF THE CLERK

No. 91-1354

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWARD J. SHAWAKER
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the United States breached a duty of "fair and honorable dealings" by making navigational improvements to the Arkansas River that damaged the Cherokee Nation's tribal property interests.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 937 F.2d 1539. The order of the court of appeals denying rehearing (Pet. App. 18a-23a) is reported at 948 F.2d 635. The order of the district court (Pet. App. 24a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1991. A petition for rehearing was denied on October 25, 1991. Pet. App. 18a-23a. On January 3, 1992, Justice White extended the time for filing a petition for a writ of certiorari to and including February 24, 1992, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Cherokee Nation of Oklahoma, a federally recognized Indian tribe, owns a portion of the bed of the Arkansas River. Beginning in 1970, the Cherokee Nation petitioned Congress for compensation from the United States for damage to its riverbed interests allegedly caused by the United States' construction of the McClellan-Kerr Project, a major federal undertaking to improve the navigability of the Arkansas River. In 1982, Congress enacted special legislation authorizing the Cherokee Nation to bring an action in the United States District Court for the Eastern District of Oklahoma to determine "any claim which the Cherokee Nation * * * may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System [the McClellan-Kerr Project]." Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944. See Pet. App. 2a-3a.

The Cherokee Nation filed a complaint seeking compensation on the grounds that the United States' construction of the McClellan-Kerr Project: (1) violated the Fifth Amendment through a taking of the Tribe's riverbed interests; and (2) breached a duty recognized under the Indian Claims Commission Act to engage in "fair and honorable dealings." 25 U.S.C. 70a *et seq.* (1976). The district court concluded that the Project resulted in a taking of the Cherokee Nation's property for which compensation was required under the Fifth Amendment, and the court of appeals affirmed. See *Cherokee Nation* v. *United States*, 782 F.2d 871 (10th Cir. 1986). This Court reversed that decision, holding that the United States'

construction of the McClellan-Kerr Project was a lawful exercise of its navigational servitude and thus did not require the payment of compensation. *United States* v. *Cherokee Nation*, 480 U.S. 700 (1987). The Court (like the court of appeals and the district court) did not reach the fair and honorable dealings claim, and it remanded the case for further proceedings. *Id.* at 702 n.1, 708.

On remand, the Cherokee Nation reasserted that the United States had breached its duty of fair and honorable dealings. The district court rejected that contention. Pet. App. 24a-28a. The court explained that to establish a fair and honorable dealings claim, the Cherokee Nation must demonstrate that the United States owed it "a special obligation or undertaking," that the United States failed to meet its obligation, and that the Cherokee Nation was consequently damaged. *Id.* at 26a. The district court concluded that the Cherokee Nation "is unable to establish any special obligation on the part of the United States concerning compensation for the United States' exercise of its navigational servitude" and that "the absence of such an obligation is fatal to such claim." *Id.* at 27a.

The court of appeals affirmed. Pet. App. 1a-17a. It agreed with the district court that a fair and honorable dealings claim must be premised on the United States' assumption of a "special relationship" specifically related to the matter at issue. *Id.* at 5a-8a. It also agreed with the district court that "the Cherokee Nation 'has failed to show, and in fact cannot show, that the United States has assumed a special obligation to compensate plaintiff for the exercise of its navigational servitude.' " *Id.* at 9a. The court of appeals evaluated the record and concluded:

> We find no indication in the materials relied on that the government undertook to restrict the exercise of its navigational servitude in the Arkansas riverbed in question, or to compensate the Cherokee Nation for any of the effects of the navigation projects of the Arkansas River Navigation System.

Id. at 13a. See also *id.* at 21a-22a.

ARGUMENT

The Cherokee Nation contends that the lower courts erred in rejecting its "fair and honorable dealings" claim. That contention is incorrect. The decisions below correctly apply established law and do not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Congress has given the Cherokee Nation special permission to bring an action against the United States under Section 2 of the Indian Claims Commission Act of 1946, 25 U.S.C. 70a (1976). See Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944 (Pet. App. 29a-30a).* The Cherokee Nation has asserted its claim under Section 2(5), which affords Indian Tribes a cause of action against the United States for, inter

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* Special legislation was necessary because Section 2 of the Indian Claims Commission Act limits the Act to claims accruing prior to the date of enactment (Aug. 13, 1946), 25 U.S.C. 70a (1976), and Section 12 provided that such claims must be brought within five years (by Aug. 13, 1951), 25 U.S.C. 70k (1976). Special legislation was also necessary to permit suit in the United States District Court for the Eastern District of Oklahoma. The Indian Claims Commission decided such claims until September 30, 1978, when the Commission was dissolved pursuant to Section 23 of the Act. See 25 U.S.C. 70v (1976). Pending claims were transferred to the Court of Claims and then to the Claims Court. See *Confederated Tribes of the Colville Reservation* v. *United States*, 20 Cl. Ct. 31, 33 (1990).

alia, "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. 70a(5) (1976).

The Cherokee Nation does not dispute that although Congress has excused it from complying with the timing and venue requirements of the Indian Claims Commission Act, the Cherokee Nation must still satisfy the substantive elements of a fair and honorable dealings claim. The Court of Claims has articulated, and the Cherokee Nation does not contest, the necessary elements:

> There must be a showing that the United States undertook an obligation, a "special relationship," the obligation was to the Tribe, that the United States failed to meet its obligation, and that as a result the Tribe suffered damages.

Aleut Community of St. Paul Island v. *United States*, 480 F.2d 831, 839 (Ct. Cl. 1973). See, *e.g.*, *United States v. Goshute Tribe*, 512 F.2d 1398, 1400-1401 (Ct. Cl. 1975); *Gila River Pima-Maricopa Indian Community* v. *United States*, 427 F.2d 1194, 1198 (Ct. Cl.), cert. denied, 400 U.S. 819 (1970); *Lipan Apache Tribe* v. *United States*, 180 Ct. Cl. 487, 502 (1967); *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780-781 (Ct. Cl. 1956). The Claims Court, which is now responsible for the remaining cases under the Indian Claims Commission Act, adheres to that approach. *Confederated Tribes of the Colville Reservation* v. *United States*, 20 Cl. Ct. 31, 50 (1990); *Gila River Pima-Maricopa Indian Community* v. *United States*, 9 Cl. Ct. 660, 678 & n.26 (1986), aff'd, 877 F.2d 961 (Fed. Cir. 1989).

The court of appeals and the district court correctly applied this settled law governing fair and

honorable dealing claims. As those courts explained, the Cherokee Nation has failed to demonstrate that the United States has assumed a special obligation on which to base the particular fair and honorable dealings claim it raises. Specifically, those courts found "no indication in the materials relied on that the government undertook to restrict the exercise of its navigational servitude in the Arkansas riverbed in question, or to compensate the Cherokee Nation for any of the effects of the navigation projects of the Arkansas River Navigation System." Pet. App. 13a; see *id.* at 27a.

2. The Cherokee Nation challenges the lower courts' conclusion that there was no special relationship, and it attempts to prove the existence of such a relationship in this Court through a document entitled "Cherokee Historical Chronology" (which was not a part of the record below). Pet. 5-14; see Pet. App. 33a-50a. The Cherokee Nation contends that this chronology demonstrates "a mutual understanding of the Cherokee Nation's sovereign and proprietary authority over navigation and commerce in the Arkansas River." Pet. 6; see Pet. 7-12. It also argues that the United States' conveyance of the riverbed to the Tribe "necessarily implicates the navigational servitude in the special relationship between the United States and the Cherokee Nation." Pet. 12-14.

The Cherokee Nation's arguments fall far short of demonstrating the type of "special relationship" necessary for a fair and honorable dealings claim. As Judge Davis explained, the Indian Claims Commission Act

> was not designed to grant compensation for all the detriment accruing to the Indians by our ongoing policy toward them but, rather, had the more limited goal of paying for specific deprivations of land

> or property or rights protected by treaty, statute or then-existing law.

Gila River Pima-Maricopa Indian Community, 427 F.2d at 1200-1201 (Davis, J., concurring). The federal action at issue in this case is the United States' exercise of its navigational servitude, which "applies to *all* holders of riparian and riverbed interests." *Cherokee Nation*, 480 U.S. at 706. To establish a fair and honorable dealings claim based on the United States' exercise of its navigational servitude, the Cherokee Nation must first show that the United States specifically promised the Tribe that it would not exercise that power. See *Confederated Tribes*, 20 Cl. Ct. at 50. The mere showing that the Cherokee Nation shared regulatory authority over the Arkansas River and had an ownership interest in the riverbed does not demonstrate that the United States "in effect, consented to forego or restrict its historic rights under the Commerce Clause such that it was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise." Pet. App. 22a.

3. The Cherokee Nation challenges the court of appeals' decision on a number of other grounds, arguing that the assertion of the navigational servitude is inconsistent with fair and honorable dealings (Pet. 14-21), that there is a "conflict" between the Interstate Commerce Clause and the Indian Commerce Clause (Pet. 21-25), that the court of appeals' decision is inconsistent with principles of morality and justice (Pet. 25-27), and that the Indian Claims Commission Act should "provide at least as broad a basis for relief as" the congressional reference statute, 28 U.S.C. 2509 (Pet. 28-30). As the court of appeals recognized (Pet. App. 21a), those arguments are beside the point. The issue here is whether the Cherokee Nation has

stated a fair and honorable dealings claim. The lower courts applied the settled principle that a fair and honorable dealings claim must be predicated on a special obligation or relationship undertaken by the United States, and those courts correctly concluded that the Cherokee Nation failed to demonstrate such a special obligation or relationship in this case. The lower courts' shared conclusion on that factbound question is decisive and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

ARGUMENT

1. The Petitioner has satisfied the requirement established in *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831 (Ct. Cl. 1973), that a fair and honorable dealings claim under section 2(5) of the Indian Claims Commission Act of 1946, 60 Stat. 1049 (ICCA), be based on a special relationship between the Petitioner and the United States. To reach their contrary conclusion, both the Court of Appeals and the Respondent misstate the requirements for a fair and honorable dealings claim.

The decision in *Aleut* is based on three legal events, the Treaty of March 30, 1867 (15 Stat. 539), in which Russia ceded Alaska to the United States, and two statutes that were enacted after cession to regulate the fur seal trade. Act of July 1, 1870, 16 Stat. 180, and Act of

April 21, 1910, 36 Stat. 326. There was never a treaty between the Aleuts and the United States, the United States never recognized any Aleut claim of title to land, and the statutes merely gave the Secretaries of the Treasury and Commerce and Labor authority to furnish food and shelter and otherwise provide for the welfare of the Aleuts. "This authority was permissive only and not obligatory and amounted to nothing more than a provision for the possible furnishing of gratuities to the natives." 480 F.2d at 843 (Skelton, J., concurring in part and dissenting in part). That authority had a practical, commercial purpose, not one that bespoke a special or fiduciary relationship.

Under Russian sovereignty, the Aleuts had been reduced to serfs in the fur trade because their aboriginal expertise in culling, killing, and dressing fur seals was essential to the economic success of the trade. 480 F.2d at 836; *see also* H.R. Exec. Docs. Nos. 129, 136, 144, 41st Cong. 2d Sess. (1870); H.R. Exec. Doc. No. 20, 42d Cong., 2d Sess. (1871). In restricting the Aleuts' aboriginal use of the seal herd for the benefit of the commercial industry, the United States decided to provide for the minimum needs of the Aleuts so they would remain a viable work force for the fur trade.

The Petitioner's relationship to the United States is far more substantial than that in *Aleut* in terms of its foundation for a fair and honorable dealings claim. In *Aleut*, the Court of Claims found a special relationship existed even though the United States had no bilateral relations whatsoever with the Aleuts. In contrast, and as set forth in the Petition, the United States made numerous treaties with the Petitioner in order to secure territory for non-Indian settlement. The United States recognized Petitioner's title and sovereignty over vast territories in the east, including governmental and proprietary control over waterways. Eventually, the United States induced the Petitioner to give up its rights in the eastern territory and embark on the Trail of Tears in ex-

change for treaty-based sovereignty and fee patent title to 14 million acres of land in Oklahoma, including the bed of the Arkansas River. The riverbed lands were later placed in trust by an act of Congress which provided that they "shall not become public lands nor property of the United States." Pet. App. 86a. All of these actions establish a special relationship within the meaning of *Aleut* regarding the navigational servitude. This special relationship is the fiduciary relationship with the Petitioner in which the United States, as trustee of the Arkansas Riverbed lands, administers them for the use and benefit of its Indian ward, the Petitioner.

2. The Respondent argues that the fair and honorable dealings claim in this case can be established only if the Petitioner first shows that "the United States specifically promised the Tribe that it would not exercise" the navigational servitude. Respondent's Br. 7. Such a showing is not required under the ICCA and, in any event, would be impossible to make under the facts of this case.

The showing is not required because the ICCA's fair and honorable dealings clause expressly waives legal defenses by authorizing claims that are not based on any existing rule of law or equity. *Creek Nation v. United States*, 168 Ct. Cl. 483, 496 (1964). It makes no sense to require a claimant under that clause to prove a specific waiver of the navigational servitude defense when that same clause generally waives all legal defenses. Any other conclusion would make the fair and honorable dealings cause of action meaningless.

In the first section of this Reply and in its Petition, the Petitioner believes that it has demonstrated the existence of a special relationship with the Respondent under the rule in *Aleut*. All that the Petitioner then should be required to show is that the Respondent breached that relationship and damaged the Petitioner by reserving and exercising the navigational servitude. The Petitioner contends that the Respondent's reserva-

tion and exercise of the servitude were unfair and dishonorable in the context of this case because they are inconsistent with the representations made by the Respondent at the time of the conveyance of the riverbed and the expectations engendered in the Petitioner thereby.

It is impossible for the Petitioner to show an intention by the Respondent to waive the navigational servitude. The doctrine that the Respondent's authority over navigation includes the power to take land under navigable waterways in aid of interstate commerce without compensation was not announced by this Court until the end of the 19th century. Petition at 15-16. Thus, in the first half of the 19th century, when the Respondent and Petitioner made their bargain and exchange, neither party was aware of the servitude.

The Respondent's opposition to the Petition is based in part on *Confederated Tribes of the Colville Reservation v. United States*, 20 Cl. Ct. 31, 50 (1990). The reasoning in *Colville* and the Respondent's reliance on it are mistaken. *Colville* errs by requiring a claimant to establish that Congress intended *in the enactment of the ICCA* specifically to waive the legal defense of the navigational servitude. No case establishing liability under fair and honorable dealings has required proof that the United States promised to refrain from employing a legal defense. In addition, the proof of a special relationship under the rule of *Aleut*, *supra*, is to be found in *the historical record of the relationship* between the United States and the Petitioner regarding the conveyance of the riverbed, not in the legislative history of the ICCA.

Moreover, the Court of Appeals, the Respondent, and the Claims Court in the 1990 *Colville* decision fail to address the Indian Claims Commission's ruling almost 15 years ago that rejected Respondent's attempt to invoke its power over navigable waters to defeat a fair and honorable dealings claim. In *Confederated Tribes of the Colville Reservation v. United States*, Docket 181-C, 43

Ind. Cl. Comm. 505 (1978), the Tribes claimed that construction of Grand Coulee Dam on the Columbia River destroyed their anadromous fishery in violation of the fair and honorable dealings clause. The United States attempted to defeat the claim by arguing that "it is settled law that ownership of the waters, their uses, and possession, remain in the sovereign, for the benefit of the public as a whole" and there is a strong presumption against the disposition of the sovereign's ownership of navigable waters. Defendant's Brief on Fisheries Claim at 2-12, *Confederated Tribes, supra* (No. 181-C). The Indian Claims Commission ruled that the defense was unavailing and awarded compensation to the Tribes:

> Defendant's final argument is that the evidence does not establish any intent on the part of the defendant to grant to the claimants compensable fishing rights in the navigable waters adjacent to the Colville Reservation. A grant of such rights is not the basis of the plaintiffs claim, but rather the Government's obligation to deal fairly and honorably with claimants concerning the right to fish which had been indulged in from time immemorial by the claimants. *The most that can be said for Government's argument is that absent clause (5) of section 2 of the 1946 Indian Claims Commission Act, such a right would not be compensable.*

(Emphasis added) 43 Ind. Cl. Comm. at 532-33. The United States did not appeal that decision.

Thus, the Indian Claims Commission concluded in the 1978 *Colville* decision that to prevail in a fair and honorable dealings cause of action, a claimant is not required to prove that the United States in some way had expressly waived any of its legal rights, including the navigational servitude. Similarly, the obligation to deal fairly and honorably with the Petitioner's riverbed title was not, and cannot be, preconditioned on an express agreement by the Respondent to waive its power over navigation. In sum, the fair and honorable dealings cause of action does

not permit the use of a legal defense against a claim based on fairness, honor and morality. *Creek Nation, supra.*

3. The Respondent misstates the historical record when it describes the Petitioner as sharing regulatory authority over the Arkansas River. Respondent's Br. 7. There is no evidence that any power sharing occurred. The record is one of consistent deference by the Respondent to the Petitioner's governmental and proprietary interest. That record provides ample basis for the Petitioner to have concluded and expected that there was no reservation of any power akin to the navigational servitude when the Respondent conveyed the riverbed to the Petitioner. Accordingly, the events surrounding the conveyance "must be interpreted as the Indians would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (citations omitted).

Nothing in this argument is intended to suggest that a reservation of the servitude did not occur as a matter of law. That issue was resolved in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). But that ruling leaves unanswered the question whether the Respondent's reservation and later exercise of the servitude without compensation to the Petitioner was unfair and dishonorable. That is the question which this Court is being asked to review.

4. Finally, the Respondent sweeps aside the remainder of the Petition by insisting that the Petitioner has not established a special relationship related to the construction of the Arkansas River Navigation Project. The Respondent's presumptive dismissal of those elements of the Petition does not justify its failure to address them. Rather than being beside the point, those elements of the Petition are integral to the determination of what constitutes fairness and honor when an implied constitutional

power comes into conflict with a congressionally established remedy that is not amenable to defenses under existing rules of law or equity.

CONCLUSION

Respondent's opposition is not well-founded. Accordingly the petition for a writ of certiorari should be granted.

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SUPPLEMENTAL BRIEF OF THE PETITIONER

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SUPPLEMENTAL BRIEF OF THE PETITIONER

PRELIMINARY STATEMENT

Petitioner submits this Supplemental Brief pursuant to Rule 15.7. On April 29, 1992, the Court of Appeals for the Federal Circuit issued an opinion in *Confederated Tribes of the Colville Reservation v. United States*, No. 90-5099 (Fed. Cir. April 29, 1992) (Opinion), which affirms in part, reverses in part, and remands in part, the Claims Court decision in *Confederated Tribes of the Colville Reservation v. United States*, 20 Cl. Ct. 31 (1990). Petitioner was unaware of the Federal Circuit's decision when it filed its Reply to the Respondent's Brief in Opposition on the following day, April 30, 1992. Because the Federal Circuit's decision bears directly on the issues in this case, and both the Petitioner and the Respondent have referred to the Claims Court decision in their arguments, Petitioner provides the following for the Court's consideration.

INTRODUCTION

The *Colville* decision involves a claim under the fair and honorable dealings clause of the Indian Claims Commission Act of 1946, 60 Stat. 1049, for "compensation for water power values of tribal lands taken in connection with the construction of the Grand Coulee Dam in the State of Washington." Opinion 1. The Claims Court concluded that this Court's decision on the Fifth Amendment claim in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987), was "extremely persuasive, if not dispositive," of the fair and honorable dealings claim. 20 Cl. Ct. 31 (1990). The Claims Court went on to conclude that: all water value interests of the Colvilles had been subordinated to the navigational servitude; the Colvilles had failed to establish an express waiver by the United States of its sovereign authority; and the ICCA did not explicitly waive "the omnipotent constitutional power" of the navigational servitude. 20 Cl. Ct. at 48.

On appeal, the Federal Circuit affirmed that the Colvilles are not entitled to compensation under the Fifth Amendment for the loss of water power values. Opinion 13. The Court stated, however, that the Claims Court's analysis was "unduly broad as it tried to sweep away a moral claim through legal analysis," *id.* at 21, because the navigational servitude is not "unquestionably dominant over other concerns." *Id.* at 22. Quoting the Tenth Circuit's decision in *Cherokee Nation v. United States*, 937 F.2d 1539, 1546 (10th Cir. 1991) (Pet. App. 15a), the Federal Circuit stated that the Claims Court erred "by failing to perform 'a judicial inquiry into the facts and circumstances' of this case in light of the moral cause of action. That inquiry must of necessity include evaluation of whether or not the Government undertook a special relationship to the Tribes." Opinion 22. Because the Claims Court had disposed of the claim on cross-motions for summary judgment, the Federal Circuit remanded the claim to the Claims Court for

> factual findings and an opinion on whether or not the course of dealings between the United States and the Colville Tribes gave rise to a special relationship or obligation with regard to the water power values of tribal lands and whether that obligation, assuming it existed, was a responsibility to the Tribes, one which the Government failed to live up to and which resulted in damages to the Tribes.

Id. at 30-31.

ARGUMENT

1. The Federal Circuit's decision in *Colville* conflicts with that of the Tenth Circuit in *Cherokee Nation v. United States*, *supra*, even though the former purports to follow the analytical requirements set forth in the latter. The Federal Circuit states that a fair and honorable dealings claim must be determined from a factual examination of the entire course of dealings between the parties. Opinion 27, citing *Snake or Piute Indians v. United States*, 112 F. Supp. 543, 552 (Ct. Cl. 1953). Consistent with that view, the Cherokee Nation had argued "vigorously" that "the entire history of its treatment by the government is relevant in connection with the fair and honorable dealings claim." Pet. App. 6a, 937 F.2d at 1542. In response, the Tenth Circuit "agree[d] that we should consider the background of statutes, treaties and any representations made to the Cherokee Nation to determine whether the requisite showing is made of a 'special relationship' as an element of the fair and honorable dealings claim." Pet. App. 7a-8a, 937 F.2d at 1543. The Tenth Circuit, however, did not do as it agreed it should; instead it severely limited the scope of its inquiry into the course of dealings to whether any facts showed a nexus to the navigation servitude and a commitment by the United States not to exercise it. As discussed in the Petition and Reply, such a showing is not required and impossible to make under the circumstances. More important, it conflicts with the test required by the Federal Circuit.

2. The Federal Circuit's decision vindicates the Petitioner's argument in this case. The Federal Circuit reversed the Claims Court decision in *Colville* because the "Claims Court dealt with the 'fair and honorable dealings' cause of action in a confusing manner, indeed without making basic, requisite fact findings necessary to determine the validity of this cause of action." Opinion 14. The Federal Circuit rejected the argument by the United States that because a claim for water power values (one of the Petitioner's claims in this case) is recognized in law or equity, it is not cognizable under the fair and honorable dealings cause of action. *Id.* at 20-21. The Federal Circuit viewed that argument as one that essentially attempts to dispose of a moral claim on the basis of a legal analysis. *Id.* at 21. The Federal Circuit concluded that the

> Claims Court's dependence on a legal analysis to attempt to dispose of a moral claim—one which existed outside the bounds of the Constitution, laws, treaties of the United States, and Executive Orders of the President—is misguided. As the Claims Court must realize, the United States can still be held liable where, even though it acts within the scope of its constitutional or legal authority, its conduct is less than fair or honorable to Indian tribes.

Id. at 21-22.

While the Federal Circuit correctly ruled that a legal defense does not lie against a moral claim, the Tenth Circuit ultimately failed to reach the same conclusion. Relying on the Claims Court's decision in Colville, the Tenth Circuit states that the navigational servitude is "extremely persuasive, if not dispositive" of the Petitioner's fair and honorable dealings claim. Pet. App. 10a, 937 F.2d at 1544. The Tenth Circuit relies on this Court's decision denying the Fifth Amendment claim in *United States v. Rands*, 389 U.S. 121 (1967), and notes favorably the Claims Court's observation (20 Cl. Ct. at 47) that the navigational servitude defense cannot be over-

come by a fair and honorable dealings claim: "Why? simply because the constitutional power to assert the navigational servitude is dominant over any and all interests when it is properly exercised through an appropriate manifestation of congressional intent." Pet. App. 10a, 937 F.2d at 1544 n.5. The Federal Circuit reversed the Claims Court on that point because the Claims Court had been "unduly broad" in its effort to "sweep away a moral claim through legal analysis," Opinion 21, and because the navigational servitude is not "unquestionably dominant over other concerns." *Id.* at 22. The reversal of that portion of the Claims Court's decision by the Federal Circuit eliminates a principal justification for the Tenth Circuit's decision.

3. The Federal Circuit's decision also illuminates the issue of the special relationship requirement of a fair and honorable dealings claim. The Federal Circuit cites with approval the separate opinion in *Oneida Tribe of Indians v. United States*, 576 F.2d 870 (Ct. Cl. 1978) which describes the origin of the special relationship requirement. Essentially, the special relationship concept was developed to account for cases in which, although "there is no contract or treaty obligation, or formal trusteeship, honor may oblige the United States to take steps to protect Indians, who have slipped into a dependence on the honor of the United States, by one means or other." *Id.* at 883 (Nichols, J., concurring in part and dissenting in part). Such a special relationship may be based on a limited record of facts and events that do not have the formal endorsement of treaties and agreements between the Indians and the United States. For example, in *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831 (Ct. Cl. 1973), the United States never intended to recognize in the Aleuts anything like the sovereignty and property rights that were recognized in the Petitioner. Congress merely authorized federal officials to look after the minimal needs of the Aleuts because of the need to keep them in service to the federal fur trade. The depend-

ency of the Aleuts having been caused by the United States, the Court concluded that the government's actions toward them entailed a corresponding duty to deal fairly and honorably with them.

In this case, there is no need to cobble together a special relationship with the United States. The Petitioner's claim is based on treaties, a fee patent, and a statutory fiduciary relationship, as well as a history of representations from federal officials, including the President, military commanders, and Indian agents, that acknowledge the Petitioner's comprehensive interest in the Arkansas Riverbed. Moreover, the claim is underlain by this Court's unique decision in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970):

> [R]eservation of the river bed [by the United States in the treaty and patent for the Cherokee domain in Oklahoma] would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects, however, the Indians were promised virtually complete sovereignty over their new lands. We do not believe that petitioners would have considered that they could have been precluded from exercising these basic o vnership rights to the river bed, and we think it very unlikely that the United States intended otherwise . . . . Indeed, the United States . . . had all it was concerned with in its navigational easement via the constitutional power over commerce.

397 U.S. at 635 (citations omitted). In the absence of compensation to the Petitioner, the Respondent cannot in fairness or honor reconcile those basic ownership rights, which this Court held Respondent had vested in the Petitioner, with Respondent's subsequent exercise of the navigational servitude.

In addition, the concurring opinion in the Federal Circuit's decision compares the Respondent's *knowing interference* in the Colvilles' interests with Respondent's *know-*

ing failure to prevent non-Indian interference with Indian water rights in *Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852 (Ct. Cl. 1982), both of which it concluded were actionable in a fair and honorable dealings claim. Opinion 11-12 (Nies, C.J., concurring). In this case, the Respondent's *ignorance* of the Petitioner's title and fiduciary-based expectations in the Arkansas River cannot excuse its obligation to have dealt fairly and honorably with the Petitioner when it constructed the Arkansas River Navigation Project.

4. The Tenth Circuit required the Petitioner to show a special relationship with a nexus to the exercise of a legal power, the navigational servitude, and prove that the United States consented to subordinate it to the Petitioner's interest. Under that test, the Petitioner is required to show that the Respondent agreed to "forego or restrict its historic rights under the Commerce Clause so that the government was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise." Pet. App. 11a, *Cherokee Nation v. United States*, 937 F.2d at 1544. That requirement is not supported by the case law and is at odds with the ruling of the Federal Circuit.

The Federal Circuit declared that a fair and honorable dealings claimant is required to prove that the course of conduct between an Indian tribe and the United States created an expectation in the tribe that would make it unfair and dishonorable of the United States to invoke a superior federal power to defeat the tribal interest. Petitioner submits that the Federal Circuit's ruling comports with the test as established in fair and honorable dealings jurisprudence. Apart from the Tenth Circuit's ruling, Petitioner is not aware of any case which requires a fair and honorable dealings claimant to prove that the United States expressly obligated itself to forego a legal right.

5. Both Petitioner's claim in the Tenth Circuit and the Colvilles' claim in the Federal Circuit were disposed of on cross motions for summary judgment. Pet. App. 26a, *Cherokee Nation of Oklahoma v. United States*, No. 83-306-C (E.D. Okla. 1987); 20 Cl. Ct. at 33. Because of the comprehensive nature of the Petitioner's interest as expressed in the treaties, fee patent and statutory trust, the Petitioner concluded that a determination of its claim was appropriate for summary judgment. The Tenth Circuit, however, summarily dispensed with the Petitioner's presentation of treaties and other evidence in which the United States recognized the need to secure rights of navigation for non-Indians and the right of Petitioner to regulate commerce in waterways under Cherokee domain. Pet. App. 22a, 948 F.2d at 637. Under the ruling by the Federal Circuit, that presentation should have signaled the existence of unresolved issues of material fact. "[T]he argument that a fair and honorable dealings cause of action could take precedence over the legal exposition of a navigational servitude depends on the facts." Opinion 28. To resolve complex issues of Indian land law and fact-intensive just compensation claims by summary judgment is error where the claim is inherently a fact question that is subject to dispute between the parties. It makes no difference that the factual dispute is raised in a moral rather than legal context, or that the parties have made cross motions for summary judgment. *Id.* In view of this ruling, the Petitioner's claim was incapable of resolution by the Tenth Circuit under summary judgment.

CONCLUSION

The Tenth Circuit's refusal to review the entire course of dealings between the Petitioner and the Respondent and the requirement that the Petitioner prove Respondent's consent to forego the navigational servitude cannot be reconciled with the Federal Circuit's decision. Accordingly, the Petition should be granted in order to reinstate Petitioner's claim, conform the Tenth Circuit's ruling to the Federal Circuit's analysis, and remand the case for an analysis of all the relevant facts regarding the fair and honorable dealings claim.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner has filed a supplemental brief arguing that the Federal Circuit's recent decision in *Confederated Tribes of the Colville Reservation* v. *United States*, No. 5099 (Apr. 29, 1992), conflicts with the court of appeals' decision in this case. Pet. Supp. Br. 3.* We disagree with petitioner's assessment. As petitioner concedes, the *Colville* decision "purports to follow the analytical requirements" applied in this case. *Ibid.* Indeed, the *Colville* decision reaffirms that a fair and honorable

* On May 6, 1992, we provided the Clerk of the Court with copies of that decision and asked that they be distributed to Members of the Court.

dealings claim must be premised upon a "special relationship," slip op. 22-23, see *Aleut Community* v. *United States*, 480 F.2d 831 (Ct. Cl. 1973), and it cites with approval the court of appeals' decision in this case, slip op. 25-26.

The Federal Circuit reversed and remanded the Claims Court's decision in *Colville*, because "the Claims Court erred in construing the legal issues as dispositive of the Tribes' moral claim and because the court failed to make fact findings on the existence *vel non* of a special relationship in light of the *Aleut* standard." Slip op. 30. As the Federal Circuit recognized, no such defects are present in this case. The Federal Circuit specifically stated:

> The Tenth Circuit, at the outset of its opinion, correctly identified the legal standard against which to measure the existence *vel non* of a breach of "fair and honorable dealings," that being the Court of Claims' four-factor test enunciated in *Aleut*.

Slip op. 25. There is, in short, no conflict between the Federal Circuit's decision in *Colville* and the court of appeals' decision here.

Petitioner renews its criticism of the court of appeals' decision based on the facts of this particular case. Pet. Supp. Br. 5-8. The court of appeals correctly concluded, however, that petitioner "has failed to demonstrate that in some way the government undertook a special relationship such that it would forego or restrict its historic rights under the Commerce Clause so that the government was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise." Pet. App. 11a. Thus, the United States did not act in an unfair or dishonorable fashion by subjecting Indian landowners to the same constitutional principles that apply to non-Indian landowners. In

Colville, by contrast, the Federal Circuit simply remanded the case for the Claims Court to make specific findings on whether the Tribes there made the sort of showing that petitioner here failed to make. Thus, the ruling in *Colville* presents no circuit conflict warranting review by this Court, especially in light of the interlocutory nature of that ruling and the non-recurring nature of the legal issue.

For the foregoing reasons and the reasons set forth in our brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

MAY 1992